In the

Supreme Court of the United States

October Term, 1969

MARK FEIN, *Appellant*,

v.

THE PEOPLE OF THE STATE OF NEW YORK

On Appeal From the Court of Appeals of the State of New York

JURISDICTIONAL STATEMENT

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No.

MARK FEIN, *Appellant*

v.

THE PEOPLE OF THE STATE OF NEW YORK

On Appeal From the Court of Appeals of the State of New York

JURISDICTIONAL STATEMENT

Appellant appeals from a final judgment of the New York Court of Appeals affirming his conviction for second-degree murder—a judgment from which Judge Fuld dissented on the ground that appellant has been deprived of due process of law because of "the conceded nondisclosure and concealment by the prosecution of evidence which, in my judgment, might well have persuaded the jurors to reach a different verdict."

OPINIONS BELOW

The New York Court of Appeals opinion (R-Z;[1] set forth at pp. 1a-12a, *infra,* of Appendix A) and Judge Fuld's dissent (R-Z; see pp. 13a-14a, *infra*) are reported at 18 N.Y. 2d 162, 272 N.Y.S. 2d 753. The Appellate Division opinion (R. 3953-3970; see pp. 17a-31a, *infra*) is reported at 24 A.D. 2d 32, 263 N.Y.S. 2d 629. The trial judge's opinion (R. 3894-3913; see pp. 31a-42a, *infra*), denying appellant's motion for new trial, is unreported.

JURISDICTION

Appellant's conviction was affirmed by the New York Court of Appeals on July 7, 1966. The judgment is included in the remittitur, which originally was entered July 7, 1966. On September 13, 1966 appellant filed in the New York Court of Appeals a motion to amend the remittitur; the motion was granted by order dated September 22, 1966; and the remittitur as amended (R-Z) pursuant to such order is set forth at pp. 14a-16a, *infra,* of Appendix A. The notice of appeal to this Court (R-Z) was filed in the Supreme Court of the State of New York, New York County (the court then possessed of the record) on September 28, 1966, within the ninety-day period permitted by this Court's Rule 10(1).

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[1] "R" refers to the record as certified to this Court by the clerk of the Supreme Court of the State of New York, New York County. Where numbered pages are referred to, they are the page numbers in the record as it was prepared for the New York Court of Appeals. Subsequent items in the certified record (not numbered in sequence) are in a set of papers called "Additional Papers to the Supreme Court of the United States", and are referred to herein as "R-Z".

This Court's jurisdiction rests on 28 U.S.C. § 1257 (2) and § 1257(3). The appeal involves the validity, under the Federal Constitution, of the New York special ("blue ribbon") jury statute (former Section 749-aa of the New York Judiciary Law, set forth at pp. 43a- 48a, *infra,* of Appendix B), which was applied to appellant over his timely objection. In addition, the appeal presents other substantial and important federal questions which, standing alone, would be cognizable by this Court only on certiorari. Pursuant to 28 U.S.C. § 2103 and this Court's established practice, these latter questions are also brought before the Court by the appeal papers, and are to be treated by the Court as if contained in a petition for certiorari. *Prudential Ins. Co.* v. *Cheek,* 259 U.S. 530, 547; *May* v. *Anderson,* 345 U.S. 528, 530; *Flournoy* v. *Wiener,* 321 U.S. 253, 263; *Mishkin* v. *New York,* 383 U.S. 502, 512; *Gent* v. *Arkansas,* 384 U.S. 937.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutory and constitutional provisions involved are set forth in Appendix B at pp. 43a-49a, *infra.* They are former Section 749-aa of the New York Judiciary Law, relating to special ("blue ribbon") juries; the Fourth Amendment; the Sixth Amendment; Section 1 of the Fourteenth Amendment; and Section 813-d3 of the New York Code of Criminal Procedure, relating to motions to suppress evidence alleged to have been obtained as a result of unlawful search and seizure.

QUESTIONS PRESENTED

1. Whether the New York special ("blue ribbon") jury statute (Judiciary Law, former Section 749-aa), on its face or as applied to appellant, is invalid and unconstitutional on the ground that it is repugnant to the Sixth Amendment or to the Fourteenth Amendment's Equal Protection or Due Process Clauses; whether appellant's trial by such a special jury, over his timely objection, deprived him of constitutional rights under any of those provisions; and whether this Court's five-to-four decisions upholding such special juries in *Fay* v. *New York,* 332 U.S. 261, and *Moore* v. *New York,* 333 U.S. 565, should be, or by implication have been, reconsidered and modified or overruled.

2. Whether appellant's rights under the Fourteenth Amendment's Due Process Clause were violated by reason of the State's (a) suppression, concealment or nondisclosure of evidence material to the defense, or (b) use of testimony known to the State to be false, or (c) use of testimony known to the State to be substantially incomplete and misleading—all of which were shown here; whether the New York courts' standards pertaining to those matters, as applied to uphold appellant's conviction, fail to comply with the standards required by the Due Process Clause; and whether the New York court decisions thereon removed issues of fact from the jury's consideration or determination, and substituted judges as the triers of material facts, in violation of appellant's right to trial by jury under the Sixth Amendment or under the Due Process or Equal Protection Clauses.

3. Whether appellant's rights under the Fourth Amendment and the Fourteenth Amendment's Due

Process Clause were violated by admission of prejudicial evidence obtained by an unconstitutional search and seizure; whether, in any event, such constitutional rights of appellant were violated by the court's refusal to conduct a hearing on the lawfulness of the search and seizure and the admissibility of such evidence; and whether appellant, as the target of that search and seizure, has standing to raise such constitutional claims.

4. Whether appellant's rights under the Fourteenth Amendment's Due Process Clause were violated by denial of his pretrial motion for discovery and inspection of the bullets removed from the deceased's body, a denial which deprived the defense of a fair opportunity to appraise the State's evidence, to cross-examine the State's expert and to counter his testimony.

5. Whether appellant's rights under the Fourteenth Amendment's Due Process Clause were violated by reason of the highly prejudicial publicity instigated by public officers charged with detection, investigation or prosecution of crime, and thereafter continued with their full collaboration and participation, and the publication of a prejudicial article which came to the attention of a juror—all of which created an unduly inflammatory atmosphere which deprived appellant of a fair trial; and whether the fact that appellant did not seek a change of venue bars him from obtaining redress for this violation of his constitutional rights, which continued during the trial.

6. Whether, in any event, the cumulative effect of the foregoing deprived appellant of a fair trial, in violation of the Fourteenth Amendment's Due Process Clause.

STATEMENT OF THE CASE

Appellant stands convicted of second-degree murder —with a sentence of thirty years to life at hard labor— on the basis of the testimony of a disreputable prostitute and procuress named Gloria whose credibility was a central issue in his trial by a blue ribbon jury. These circumstances underscore the seriousness of the violations of appellant's constitutional rights by the prosecution's systematic concealment from the defense, and from the jury, of important evidence bearing both on Gloria's credibility and on other pivotal facts relating to the homicide.

The deceased was a bookmaker named Rubin Markowitz, whose body was found floating in the Harlem River on November 8, 1963. On February 25, 1964, after Gloria had given testimony before the grand jury implicating appellant, he was indicted for first-degree murder (R. 4A-5A). Following various preliminary proceedings, appellant's trial, before a special (blue ribbon) jury, began in the Supreme Court, New York County, on October 19, 1964 (R. 1) and was completed on November 25, 1964, when the jury brought in a verdict of guilty of murder in the second degree (R. 2264-2267). New counsel (R. 2B) filed a motion for new trial (R. 23B-26B) supported by affidavits and exhibits (R. 27B-484B) adducing extensive newly-discovered evidence, including important evidence which the prosecution had previously withheld from the defense and from the jury. With respect to the latter, the trial judge conducted a post-trial hearing (R. 2293-3880), and denied the motion (R. 3882) with an opinion (R. 3894-3913; see pp. 31a-42a, *infra*); and appellant was sentenced (R. 3885). The Appellate Division, First Department, affirmed (R. 3952) with an opinion

(R. 3953-3970; see pp. 17a-31a, *infra*). The Court of Appeals likewise affirmed with an opinion (R-Z; see pp. 1a-12a, *infra*). Judge Fuld dissented, on the ground that appellant had been deprived of due process of law because of "the conceded nondisclosure and concealment by the prosecution of evidence which, in my judgment, might well have persuaded the jurors to reach a different verdict" (R-Z; see pp. 13a-14a, *infra*).

Substantial and important federal questions were presented and decided below:

1. *Unconstitutionality of New York's Special ("Blue Ribbon") Jury Statute.* This appeal brings back for this Court's further consideration the five-to-four decisions upholding New York's blue ribbon jury statute in *Fay* v. *New York,* 332 U.S. 261, and *Moore* v. *New York,* 333 U.S. 565.

Before appellant's trial, the prosecution moved for a special jury (R. 168A-172A). Known in New York as a "blue ribbon" jury, the special jury was provided for by the New York Judiciary Law, Section 749-aa (pp. 43a-48a, *infra,* of Appendix B), as then in effect [2] and applicable to counties having a population of one million or more inhabitants (i.e., only certain counties in New York City). Appellant opposed the motion (R. 173A-176A). He urged the court to follow a 1960 decision, *Schuster* v. *City of New York,* 25 Misc. 2d 670, 205 N.Y.S. 2d 190 (Sup. Ct., Kings County), which, in denying the motion for a special jury in a

[2] New York has subsequently repealed the special jury statute in its entirety (see p. 43a, *infra,* note). But the repeal was effective September 1, 1965 and hence inapplicable to this appellant's trial and conviction.

civil case, had relied (see 25 Misc. 2d at 678-679, 205 N.Y.S. 2d at 199-200) on the *Fay* dissenting opinion. Appellant quoted (R. 174A-175A) the principles expressed in *Schuster* (25 Misc. 2d at 684, 205 N.Y.S. 2d at 205) that:

> "There can be no true equal representation of a community if jurors are selected because of an alleged economic, social, or superior educational status . . . There is no justification today for a jury system which divides citizens into special or blue ribbon jurors and ordinary or general jurors. Such discrimination short-circuits our democratic processes. . . ."

Appellant then alleged (R. 175A) that under the Constitution of the United States and the command of the Supreme Court of the United States, the New York special jury statute is "no longer valid or viable". The prosecution's motion was nevertheless granted (R. 167A), and a special jury was empaneled at appellant's trial (R. 164A-166A, 177A-178A, 1, 9).

There were 400 persons on the special jury panels (250 on the original panel and 150 on the additional panel) from which the special jury was drawn; and it is obvious from inspection of the lists that the panels were exceptionally top-heavy with professional and executive people, that they contained very sparse representation of ordinary workingmen or daily wage earners—particularly, "blue collar" workers, and that they contained only 11 women out of the 400 persons.[3]

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[3] Lists of the two special jury panels were turned over to defense counsel in connection with the selection of the jury, and copies thereof are being lodged with the Clerk of this Court. With respect to each of the 400 persons, the lists show the juror's sex, name, occupation and address.

The federal constitutional question was urged on appeal, both in the Appellate Division (appellant's brief, pp. 183-186, and reply brief, pp. 36-37) and in the Court of Appeals (appellant's brief, pp. 81-88). The question was expressly decided by the Court of Appeals (see pp. 2a and 15a, *infra*) solely on the authority of this Court's five-to-four decisions in *Fay* and *Moore*, which the Court of Appeals accepted as establishing that appellant's constitutional contention "has been considered before and found to be without merit."

2. *The Prosecution's Concealment of Material Evidence and Its Sponsorship of False Testimony.* The prosecution's concealment of material evidence and its sponsorship of false testimony present federal constitutional questions which are exceptionally serious and substantial. These questions, first raised by appellant's motion for new trial (R. 23B-175B) when the prosecution's unconstitutional course of conduct came to light, were expressly decided by the New York Court of Appeals (pp. 4a-12a, *infra*), and they formed the basis for Judge Fuld's dissent (pp. 13a-14a, *infra*). The most shocking of these matters, and the one which Judge Fuld correctly accepted as alone sufficient to compel reversal of the conviction (without even considering the others), relates to the prosecution's complete suppression of the crucial testimony of Mrs. Dagmar Generazio.

(a) *Mrs. Generazio: Her Suppressed Testimony, Her Confrontation of Gloria, and the Prosecutor's Sponsorship of False Testimony Relating Thereto.* Mrs. Dagmar Generazio was a friend of the prosecution's key witness, Gloria, and, like Gloria, had also practiced prostitution. There is no dispute as to the importance of the testimony of Gloria (R. 1099-1440). The Court of Appeals (p. 1a, *infra*) refers to Gloria as

"the primary witness for the prosecution"; and at the post-trial hearing the prosecutor flatly conceded (R. 3494-3495) that without Gloria's testimony "the prosecution had no case against Mark Fein". Gloria was characterized by the Appellate Division (p. 22a, *infra*) as a "completely amoral person who could well merit the defense's description as a depraved character".

As the Court of Appeals stated (p. 1a, *infra*), Gloria's testimony—"and the People's case"—was that shortly after 5 p.m. on October 10, 1963, appellant telephoned Gloria and urgently requested her to come to the apartment he maintained under the assumed name "Weissman" for extramarital activities. According to Gloria's testimony, when she arrived at the apartment, appellant showed her a trunk and said he had shot Markowitz, whose body was in the trunk. Gloria testified that appellant lifted the trunk lid and that she "saw part of an arm, and some new clothes line, and some white material that looked like a shirt" (R. 1133-1141). Gloria testified that appellant requested her help in disposing of the trunk; that Gloria, with two friends of hers—Broudy and Miss Geri Boxer—drove off in a station wagon (without appellant) and, after a stop at Gloria's apartment house, threw the trunk into the Harlem River (R. 1145-1156). No such trunk was ever found. The prosecution's case that appellant had admitted the killing turned solely on Gloria's credibility.

Appellant did not testify at the trial. In an affidavit subsequently submitted in connection with the motion for new trial, appellant stated that on October 10, 1963 he had received a telephone call from Gloria summoning him to the Weissman apartment; that

when he arrived, Gloria told him Markowitz had been murdered and demanded his assistance in removal of the trunk, threatening that otherwise he would become involved and his association with Gloria would be exposed to appellant's wife, his family and others; that, panic-stricken, appellant had acceded to Gloria's demands and agreed to assist her; that Gloria later continued to threaten him and attempted to extort money from him; and that it was now clear to him that there had been no body in the trunk but that this had been told to him to set him up later for a blackmail scheme (R. 179B-182B). Since appellant did not testify at the trial, this evidence was of course not before the jury.

But the trial did bring out the facts that Gloria herself, her husband and her relatives had originally been under intensive police investigation in connection with the murder, and Gloria fled to Canada for a month (R. 1626-1630, 1684-1690, 1602-1612, 1184-1185). The evidence also showed Gloria's subsequent efforts to obtain money from appellant (R. 1887-1891, 1184-1185). However, it was only after the trial, in connection with the post-trial hearing, that the suppressed evidence came to light which, as Judge Fuld's dissent pointed out (p. 13a, *infra*), "suggested—or, at least, so the jury could have found—that Gloria, rather than the defendant, was responsible for the murder and thus had a compelling motive to accuse him of the crime."

At the trial the prosecutor, after concluding Gloria's direct examination, stated, with a virtuous display of candor, that Gloria had twice recanted her story in his presence—first on June 30, 1964, and, more importantly, on September 28, 1964 (R. 1201-1204). But the prosecutor did not disclose the critical circum-

stances which gave the second recantation its real significance. Nor did he make any effort to correct the false testimony of Gloria and of his own investigator, Detective Leman, which carefully suppressed the same critical circumstances. These circumstances relate to the part played by Mrs. Generazio, whom the prosecution successfully obliterated from the case.

From the evidence at the post-trial hearing, it appeared that Detectives Leman and Lyons worked on the case under the instruction and supervision of the District Attorney's office (Leman, R. 2298, 2299, 2324). Late in September 1964, they visited Mrs. Generazio at her home in Red Bank, New Jersey, interviewing her at length (Leman, R. 2299-2307, 2368-2373). Thereafter she was interviewed in the District Attorney's office on four or five occasions (Leman, R. 2311-2319), and on at least three of them she was interviewed by the prosecutor, Mr. Dermody (Dermody, R. 3354-3360). In addition, Detectives Leman and Lyons were in telephone communication with Mrs. Generazio on an almost day-to-day basis during October 1964, the month the trial began; Detective Leman admitted to having had ten telephone conversations with her during that month, of which five or six were placed by him from the District Attorney's office pursuant to the prosecutor's instructions, and Leman said he did not know how many additional times Detective Lyons had talked to her (Leman, R. 2319-2321, 2324, 2438-2439). He also admitted that the Detectives discussed with her whether anyone representing the appellant had been in touch with her, that they told her to advise them if anyone did, and that each time she always told them no one on behalf of appellant had been in touch with her (Leman, R. 2321-2324).

At the post-trial hearing Mrs. Generazio testified (R. 2547-2551) that on October 10, 1963 (the alleged date of the crime), she was living at the apartment of a friend, Gail Tracy, and received a telephone call there from Gloria between 3 and 4 p.m. Gloria told her that she (Gloria) was nearby and had a heavy box to move and she asked Mrs. Generazio, without avail, whether Mrs. Generazio could borrow Miss Tracy's car or any other car for her. Mrs. Generazio testified that before the trial she had told this to Detectives Leman and Lyons (R. 2559-2567) and to the prosecutor, Mr. Dermody (R. 2570-2572). She testified that they kept telling her she must be wrong as to the time of the phone call, that it must have been later (R. 2567, 2585-2586, 2592, 2593). However, Mrs. Generazio testified that she was able to fix the time of the call as between 3 and 4 p.m. by reason of certain coincidental circumstances (R. 2551-2552, 2578). In addition, she testified that in November 1963 and January 1964 Gloria had come to see her, had pleaded that Mrs. Generazio "stick with her", and promised that Mrs. Generazio would receive something valuable if she did (R. 2552-2554); and she had told the prosecutor and the detectives about these conversations also (R. 2588-2589).

At the post-trial hearing, both the prosecutor and Detective Leman acknowledged that Mrs. Generazio had told them about Gloria's telephone call to her. Nor did they deny that Mrs. Generazio had reported to them Gloria's two subsequent requests to "stick with her". They differed with respect to the time of the call: they testified she had told them the call was later, between about 6 and 7 p.m., instead of between about 3 and 4 p.m. (Leman, R. 2330-2331, 2371-2372, 2376-

2378, 2430-2431, 2451; Dermody, R. 3349, 3352-3353, 3357-3362). Since, as shown by independent evidence, the deceased had been alive shortly after 4 p.m. (R. 278-280), such a telephone call by Gloria between 3 and 4 p.m. would clearly have implicated Gloria by indicating that she was making plans to dispose of the body before the murder had occurred. Moreover, since 3 to 4 p.m. was considerably earlier than the time (after 5 p.m.) when Gloria claimed appellant summoned her to the Weissman apartment (see p. 10, *supra*), this would have demolished the prosecution's case as presented by Gloria's testimony.

However, even accepting the prosecution's version that the stated time of the call was between 6 and 7 p.m., the prosecution's failure to disclose it was still highly prejudicial to appellant. First, such disclosure would have gravely impaired Gloria's credibility with respect to the specific events of the day on which the murder allegedly occurred, as well as her general credibility. Second, Gloria had testified that at this very time (between 6 and 7 p.m.), while she, Broudy and Miss Boxer were driving in the station wagon with the trunk in it, she went upstairs to her own apartment and spent a substantial period of time there, while her friends waited for her outside (R. 1370; see also R. 791 and 905). Had the prosecution disclosed that it had evidence indicating that Gloria had at that time telephoned Mrs. Generazio in an attempt to borrow a car to remove a box, the jury might well have inferred that the deceased's body was not in the trunk at all, but was elsewhere, awaiting removal, and that, therefore, the substance of Gloria's entire narrative was false.

The climactic event was the meeting which the prosecutor (Mr. Dermody) arranged in his office on Septem-

ber 28, 1964, for the purpose of having Mrs. Generazio confront Gloria.[4] Here the prosecution's own descriptions at the post-trial hearing were vivid and revealing. Detective Leman testified that on that occasion the other persons present were Mr. Dermody, Detective Lyons and himself (R. 2326). He and the prosecutor testified that when Mrs. Generazio finished, the prosecutor asked Gloria whether this had happened; she called Mrs. Generazio "a goddam liar"; Gloria got very angry and upset, she exploded and "got very excitable,"[5] she screamed hysterically and was told she was upsetting the whole building by her loud noises. Detective Leman took Mrs. Generazio out of the room, and Gloria said she wanted to call her lawyer (Leman, R. 2377-2378, 2326-2328; Dermody, R. 3362-3363).

The extraordinary significance of this incident became apparent when the prosecutor on cross-examination disclosed (Dermody, R. 3496-3497):

> "She [Gloria]then started to yell and scream and accuse, as I said yesterday, Detective Leman of getting people to say things that weren't true. And that's when she said that she wanted to speak to a lawyer. We calmed her down. She spoke with a lawyer. And then after Dagmar [Mrs. Generazio] left the room with Detective Leman, she said to me that she would not testify; and, as a matter of fact, she went back to the story she had given us once before in the end of June that the

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[4] Merely for purposes of clarification, it should be noted that at the post-trial hearing, the prosecutor (Mr. Dermody), although he at first testified he thought the date of this second recantation was September 29th (R. 3360), later corrected this to September 28th (R. 3497-3499).

[5] Mrs. Generazio testified at the post-trial hearing that Gloria also exclaimed "You're trying to pin this on me" (R. 2595; see also R. 2698-2699).

defendant never told her that he had shot the deceased and she had seen the body in the trunk."

Not only were all of these events, except the bare fact of a recantation by Gloria on that date, concealed from the defense, but the testimony given at the trial by both Gloria and Detective Leman was false and misleading.

At the trial, when Gloria was cross-examined concerning the meeting in the prosecutor's office on September 28th, she answered that the persons present, in addition to herself and the prosecutor, were " I think Detective Lyons and Leman", and "I don't remember anyone else". She made no reference whatsoever to Mrs. Generazio's presence during this meeting, nor to the crucial role that Mrs. Generazio's presence played in the recantation.

Detective Leman, an arm of the prosecution, was also cross-examined by defense counsel at the trial concerning Gloria's successive changes in her story. In giving the names of the persons present at the September 28th meeting, he gave all the names except that of Mrs. Generazio (R. 1635-1639)—thereby concealing the whole purpose of the meeting. Neither during this cross-examination nor during his redirect by the prosecutor (R. 1665-1666) did Detective Leman make any reference whatsoever to the presence of Mrs. Generazio or to her confrontation and contradiction of Gloria. Like Gloria, he obliterated every trace of Mrs. Generazio from his testimony.

The prosecutor himself, who participated in the September 28th meeting in his office, had personal knowledge of the falsity of this testimony of both the prin-

cipal witness Gloria and of Detective Leman. Nevertheless, he did not make the slightest effort to correct this testimony, nor to bring out the suppressed facts.

Moreover, the prosecutor permitted Gloria not only to omit all reference to Mrs. Generazio, but to testify at the trial that her reason for the September 28th recantation was that "The idea of coming here and saying these things that might hurt this man [appellant] was against all my principles" (R. 1429). The prosecutor clearly was aware of Gloria's less altruistic motivation; the prosecutor's own account of this event under cross-examination at the post-trial hearing was (R. 3507):

> "She was mad at Leman. She accused Leman of trumping up this story, getting Dagmar [Mrs. Generazio] to trump up this story about her; and out of spite to Leman, she told us she wouldn't testify and said that Fein never said it."[6]

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[6] For the hearing on the motion for new trial, appellant's counsel made every effort to obtain the attendance of Gloria so that she could be examined, for the first time, about the suppressed facts. Three subpoenas were issued, but Gloria could not be found (R. 3233, 3235-3236). The prosecutor stated to the court on April 19, 1965 that he did not have any idea as to Gloria's whereabouts (R. 3233), but on April 20, 1965 he testified that he had talked to her on the telephone "about maybe three or four weeks ago" (R. 3386-3388). It will be noted that "three or four weeks ago" would have been just around the date (March 26, 1965) when the trial judge had written both sides, setting a date for the post-trial hearing (R. 524B). It certainly seems strange that the prosecutor, knowing of the imminence of the new trial hearing, which was largely concerned with events in which Gloria participated, would so easily have lost track of her whereabouts. The District Attorney had been served with appellant's motion papers, and the prosecutor was fully aware that Mrs. Generazio's evidence, in contradiction of Gloria's, was to play a cardinal part in the hearing. To this date, therefore, appellant has still been deprived of the full and fair hearing to which he is entitled under the Constitution.

The prosecutor was compelled to acknowledge, at the post-trial hearing, that none of these facts had been disclosed to the defense or to the court (R. 3447-3448, 3509-3511).

The prosecution could not possibly claim that it had merely forgotten about Mrs. Generazio (who was the whole occasion for the September 28th meeting). For example, at the high point of the trial, an extensive telephone call concededly was made from the District Attorney's office to Mrs. Generazio at her home at Red Bank, New Jersey, on Friday, November 13, 1964 (telephone company records, R. 2747-2749). As we have said, in the numerous telephone contacts between the Detectives and Mrs. Generazio, the question whether anyone on behalf of appellant had gotten in touch with Mrs. Generazio was admitted by Detective Leman to have been a recurring subject of conversation (see p. 12, *supra*). These circumstances heighten the significance of this particular call as yet another step in the prosecution's systematic course of suppression. For this call was made the very same day that Gloria gave some of her false testimony eliminating Mrs. Generazio from the meeting at the prosecutor's office (R. 1323, 1392), and only two court days preceding Detective Leman's testimony on November 17 to the same effect (R. 1558, 1637-1638). Indeed, the call was made on the court day preceding Gloria's redirect examination on Monday, November 16 (R. 1400), when the prosecutor again reverted to the September 28th meeting without in any way bringing out the suppressed facts (R. 1429-1431). It is evident that the prosecution would have handled the matter very differently if the report from Mrs. Generazio had

been to the effect that she had been located by the defense, so that the prosecution would have concluded that concealment no longer was safe.

It is incomprehensible how the Court of Appeals majority could say (p. 8a, *infra*), citing 24 A.D. 2d 42, that "the testimony in question was not in fact false or perjurious." At the page cited [pp. 29a-30a, *infra*], the Appellate Division stated:

> "Technically speaking, this testimony was correct, because at the time of the recantation she [Mrs. Generazio] was not present. But it was not an accurate statement as to those present at the interview."

Not only was the testimony false, but it was even "technically" incorrect. Both Gloria and Leman were testifying, not about "the time of the recantation," but about the confrontation between Gloria and Mrs. Generazio, which immediately preceded it. Thus, Gloria included Detective Leman among the persons present (R. 1392-1393). Since Leman was not present during the recantation itself, any more than Mrs. Generazio was (R. 1393, 2328)—they having left the room together (Dermody, R. 3497)—Gloria was obviously testifying, and lying, about the time preceding her recantation, when Mrs. Generazio, as well as Leman, was there. In Leman's case, he could not possibly have referred to the recantation itself because (as just stated) he admittedly was not present when it occurred (R. 1637-1638, 3496-3497). At the post-trial hearing Detective Leman expressly acknowledged that he left the room with Mrs. Generazio and did not "know what happened after that" (R. 2328). At the time when he and Gloria were present, so was Mrs. Generazio. Thus

the record clearly shows that both of the prosecution witnesses lied.

Further implementing the planned obliteration of every trace of Mrs. Generazio, the prosecution, particularly through Detective Leman, frustrated appellant's chance of locating Mrs. Generazio. Shortly before the trial, a defense investigator heard a "grapevine rumor" about a girl named "Dee", who might have knowledge regarding the case, and he diligently attempted to obtain information about her (R. 2913-2914). He ultimately learned, after the trial had commenced, that the girl's name was Dagmar Finch and that there was a rumor that she had told the District Attorney's office that Gloria had called her for the loan of a car (R. 2915-2925). However, both the investigator and defense counsel were utterly unaware that Dagmar had married, that her name was now Mrs. Generazio, and that she now lived in New Jersey (R. 3004-3009, 2911-2916, 2925-2927, 2931). During the trial, this defense investigator told Detective Leman about the rumor he had heard concerning Dagmar Finch, and asked Leman for her telephone number and address, so that the investigator could interview her (R. 2914-2916, 2918, 2928, 2930, 2936). Leman refused this request, stating: "I am not at liberty to give it to you" (R. 2929-2930, 2936). The prosecutor, moreover, admitted at the post-trial hearing that he himself had "become aware that the defense was looking for Dagmar" (R. 3442-3443).

Three other matters of nondisclosure by the prosecution are also presented, to which we shall refer briefly.

(b) *Sandra Ede.* Gloria testified that when she received the call from appellant on the afternoon of

October 10, 1963, the alleged date of the murder, one Sandra Ede was in Gloria's apartment (R. 1133-1134). Geri Boxer (see p. 10, *supra*) testified that when she went to Gloria's apartment on that day to meet Gloria she was told by Sandra Ede over the intercom to meet Gloria at the Weissman apartment, and that was the occasion for her going there (R. 705-707, 783-786). After the prosecution rested its case, the prosecutor stated he was not calling Sandra Ede as a witness because Miss Ede claimed to have had no recollection of the events that allegedly transpired on October 10th, but that nevertheless he wished to furnish her name and address to the defense, which he did (R. 1747-1748). In the light of this representation, the defense did not call her as a witness either. The question is whether the prosecutor's representation was unfair, and a material concealment. In some of her interviews with the prosecution, Miss Ede had said she had no specific recollection one way or the other (R. 3283-3287, 3373-3381). But she also had told the prosecutor something very different. As the Appellate Division found (see p. 25a, *infra*), based on evidence given at the post-trial hearing by, among others, Detective Leman (Leman, R. 2358-2361, 2413-2414, 2420-2421):

> "On the motion for a new trial it was established that * * * Miss Ede * * * stated [to the district attorney] * * * that she was not in the apartment at the time and consequently never received the message; that she had never spoken to Miss Boxer on the intercom; and that on the afternoon in question she was in her own apartment to see to the installation of a telephone."

This information was highly material; it cast further doubt upon the testimony and credibility of Gloria as

well as Miss Boxer. The Appellate Division ruled (pp. 25a-26a, *infra*) that there was no concealment because it appeared, from the cross-examination of Miss Boxer as quoted in the Appellate Division's opinion, that "all the Ede statements were known to the defense". But it is evident from the testimony quoted (set forth at p. 25a, *infra*) that the defense had only fragmentary information on the matter. The Court of Appeals held there was no suppression because Miss Ede "consistently advised all representatives of the prosecution that she could not recollect the events of October 10, 1963" (pp. 4a-5a, *infra*). But as we have shown, this is by no means so. The question then is whether, when a potential witness has given conflicting statements to the prosecution, the prosecution is nevertheless at liberty to put forward a half-truth disclosing one of the versions and utterly concealing the other totally different version.

(c) *The McNair-Bennett Testimony.* The Appellate Division itself found that Mrs. McNair and Mrs. Bennett (two entirely reputable witnesses) told the authorities "that on the afternoon of October 10 they heard pistol shots which they believed emanated from the alleyway beneath their windows and in the rear of the house" (p. 26a, *infra*). The Weissman apartment, where the murder was allegedly committed, is, on the other hand, in the front of the building and two floors above the apartment occupied by the two women, so that the shots heard by these women could not have been fired there (R. 2826-2827). Nevertheless, the prosecution concededly did not disclose the statements of these women to the defense (R. 3413).

The dismissal of this evidence by the Court of Appeals (p. 5a-6a, *infra*) is based on its alleged in-

credibility—which is plainly irrelevant, so long as the testimony might have had some weight with the jury. The court also ignored the post-trial admission of Detective Leman, the prosecution's chief investigator, that when the women told him about hearing the shots he considered the information to be "important" (R. 2348). At the post-trial hearing the prosecutor testified that, on the basis of what one of the women had told him, he believed that the women themselves already had given this information to defense counsel (R. 3368-3371). Assuming his good faith on this, he nevertheless was in error. Whatever the prosecutor thought the women told him, the testimony is clear that this information was never communicated by the women to defense counsel (R. 2961, 2963, 2989, 2992, 3000). Accordingly, the question presented is whether a prosecutor has fulfilled his obligation where he fails to disclose material evidence to the defense merely because he believes it has already been disclosed to the defense by the potential witness herself. Our contention is, instead, that justice requires that if the prosecutor elects not to make a direct disclosure to the defense, he has assumed the risk of the defense remaining uninformed.

(d) *Detective Kelly's Ballistics Report.* The prosecution also failed to make known to the defense Detective Kelly's ballistics report (R. 150B), which concluded that there was no evidence of any bullets in the Weissman apartment. That tended to show that the shooting did not occur in that apartment—an inference supported by the McNair-Bennett and other evidence. The Court of Appeals found justification on the ground that the Kelly report "was fully superseded" by the tests by Detective O'Brien (p. 4a, *infra*). However,

O'Brien merely testified that the wood putty in a hole in a floor board in the apartment contained some metal residue which "could have been" "consistent with being part of a bullet" (R. 1726). In any event, there should have been left to the jury the opportunity to consider and weigh both statements. Moreover, the Court of Appeals was mistaken in its view that the Kelly report was "fully available to defendant" (p. 4a, *infra*). Although the defense did serve a general subpoena for reports which brought them physically into the courtroom, it could not, under the procedure applied, demand or inspect one of these reports unless the defense specifically requested it, and the defense could not request the Kelly report precisely because the prosecution had not disclosed its existence.

Each of the prosecution's suppressions and concealments, and sponsorship of false or misleading testimony, constituted a violation of appellant's constitutional rights. Cumulatively, their effect is even greater. All of the suppressed or withheld evidence would clearly have assisted the defense in probing into the fundamental facts. Even more importantly, it might have persuaded the jury (a) that Gloria's twice-recanted, crucial testimony against appellant was false, (b) that Gloria, not appellant, committed the murder, or, at least, was directly implicated in it, (c) that arrangements for disposing of the body were being made by Gloria or others before appellant allegedly committed the crime, (d) that the crime occurred elsewhere than in the Weissman apartment, or (e) that, in any event, a reasonable doubt existed as to appellant's guilt.

3. *Unconstitutional Search and Seizure and Denial of Hearing.* It is not disputed that a chair received in

evidence (Ex. 54), which had been stored in a storage warehouse under appellant's pseudonym "Weissman," was seized by detectives without a search warrant, without anyone's consent, and over the protest of the warehouse manager (R. 1536-1538, 390-390B).

When the prosecutor first sought to introduce the chair in evidence, defense counsel objected specifically on the ground of unlawful search and seizure and he also moved to suppress the evidence "and if necessary to hold a hearing" (R. 588-589). The prosecutor unequivocally represented to the court and defense counsel (R. 590) that "the arrangements to take the furniture, including this chair, out of the apartment were made by this Gloria Kendal at the defendant's request." The court itself confirmed this, asking defense counsel in the jury's presence:

> "You want to have a nine day hearing on it? He says Gloria Kendal took the furniture and put it there at his request" (R. 590).

The court nevertheless grudgingly agreed to hold a hearing (R. 591)—which under the applicable New York statute, Code of Criminal Procedure, § 813-d3 (see p. 49a, *infra)* was required to be held "in the absence of the jury." The prosecutor then stated that he would defer the introduction of the chair until a later time, and it was agreed and understood that apellant would "have an opportunity to raise the question . . . later" (R. 593).

Thereafter, Gloria testified that she arranged for the storage of the Weissman apartment furniture, including the chair, under the name Weissman, pursuant to appellant's instruction to her to "get rid of the furniture" (R. 1168-1174, 1191-1194). At the conclusion of Gloria's testimony, the prosecutor again

offered the chair in evidence, and the court received it over defense counsel's objection (R. 1193). Defense counsel then moved to strike the chair from evidence and reminded the court of the prior understanding. Nevertheless, the court denied the motion summarily and without a hearing (R. 1194-1195).

Later, police testimony was given concerning the seizure of the chair at the warehouse and the making of tests showing that a stain on the chair seat contained human blood (R. 1536-1538, 1708-1720). Throughout such testimony the defense renewed its objections, and the court stated that the defense had a continuing objection and exception to all testimony concerning the chair (R. 1536-1537, 1709). In his summation, in trying to convince the jury that appellant had killed Markowitz in this apartment, the prosecutor pointed to the chair as having been "tested and found to have human blood" on it (R. 2146-2147).[7]

Only in denying the motion for a new trial, did the court formulate the theory that appellant had "abandoned" the chair (p. 32a, *infra*). Relying solely on this ground, the Court of Appeals rejected appellant's constitutional contentions and upheld the prosecution's use of the evidence (p. 3a, *infra*).

4. *Denial of Pre-Trial Inspection of Bullets.* Four bullets had been found in the body of the deceased. The defense made a timely motion for pre-trial discovery

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[7] The Appellate Division acknowledged that the amount of blood on the chair was too small to serve "as proof that the homicide took place in the apartment" (see pp. 21a-22a, *infra*). This acknowledgment was, of course, far too late to offset the severely prejudicial effects of the use which the prosecutor had made of the unconstitutionally seized chair in his presentation of evidence and his summation to the jury.

and inspection of the bullets (R. 31A-38A), which the prosecution opposed (R. 7A, 42A) and the court denied (R. 30A). At the trial the prosecution's ballistic witness, Detective Haase, testified about the four bullets he had examined, to the effect that "they have come from a firearm with a right six rifling" (R. 266) —thereby conveying to the jury the impression that all four bullets were shot from a single firearm. Having been denied all opportunity for its own expert to inspect the bullets before the trial, the defense was in no position to assess Haase's testimony or to cross-examine him adequately. The prejudice became apparent later when, in support of the motion for new trial, appellant was able to tender expert evidence that Haase's testimony had been "erroneous and misleading," in that only one of the four bullets could be identified as having been fired from a firearm with a "right six rifling" (R. 271B-273B). The Court of Appeals nevertheless held (amended remittitur, p. 15a, *infra*) that appellant's constitutional rights were not violated.

5. *Prejudicial Publicity.* Immediately after appellant's arrest on February 21, 1964, the police launched an avalanche of charges, information and misinformation to the press—including various claims of evidence which eventually the prosecution never was even able to proffer at the trial [8]—which had the effect of convicting appellant in the eyes of the public before he was tried and of vitiating his right to a fair trial. This

[8] For example, the newspapers were given "information" that appellant had put the murder gun in the duffle bag (R. 103A). At the trial the prosecution was unable to produce any such evidence. For another example, "information" was given to the press that the rug cut out of the floor was "bloodstained" (R. 103A). Even Gloria testified, however, that she did not see any blood on the pieces of carpet (R. 1355-1356).

began with a two-hour press conference held by detectives on the morning of the arrest (R. 59A).

These circumstances were brought to the court's attention in connection with a bail application filed by defense counsel on March 2, 1964 (R. 55A-89A). The court denied bail (R. 89A, 7A), but took no steps whatsoever to halt the police press campaign nor to institute safeguards to assure that such severely prejudicial activities by the prosecution would cease. In fact they did not cease. Defense counsel on June 1, 1964, in renewing the bail application, brought to the court's attention two lengthy and lurid articles which had appeared in the June issues of "True Detective Magazine" and "Official Detective Stories" (R. 90A-108A). Examination of these articles makes it clear that the authors were materially assisted by Detectives Leman and Lyons—the same police detectives who were later involved in the Mrs. Generazio episodes (see pp. 9-20, *supra*). These detectives were quoted at length, in a demonstration of their ingenuity and brilliance in "solving the case". Again, the court took no steps to bring a halt to such activities. Later, even during the trial, it would appear that the detectives maintained a close relationship with the press, and publicity prejudicial to appellant continued to be printed. A lengthy article was published in the New York Herald Tribune of November 18, 1964 (R. 174B) which from its contents must surely have been inspired by Detective Lyons. Because of its particularly prejudicial nature, defense counsel promptly brought it to the court's attention (R. 1675-1678). One of the jurors actually admitted having seen this article, though he claimed he had not "read" it (R. 1677). Despite this, and despite the presence of alternate jurors from whom a substitute juror could have

been selected (R. 1678), the court did not remove that juror.

Appellant's motion for new trial urged the constitutional question under the Due Process Clause of the Fourteenth Amendment (R. 28B, 140B-147B, 154B-174B). The Court of Appeals (pp. 2a-3a, *infra*) sustained the trial judge's ruling (p. 32a, *infra*) rejecting this contention.

REASONS WHY THE QUESTIONS ARE SUBSTANTIAL AND DESERVE REVIEW BY THIS COURT

I. UNCONSTITUTIONALITY OF NEW YORK'S SPECIAL ("BLUE RIBBON") JURY STATUTE

Nearly twenty years ago, in *Fay* v. *New York,* 332 U.S. 261, and *Moore* v. *New York,* 333 U.S. 565, this Court by five-to-four decision upheld the use of special ("blue ribbon") juries under the New York statute involved in the present case. That precedent was the sole basis on which the New York Court of Appeals rejected appellant's constitutional contentions on this question (see pp. 7-9, *supra*). But surely a precedent so outmoded cannot settle the matter in this Court.

1. We submit with all respect that *Fay* and *Moore* were wrong when decided and are even more plainly wrong today. The question is a basic one of constitutional law which clearly calls for reexamination twenty years later by the Court as presently constituted. The majority of five in *Fay* and *Moore* did not include any Justice presently sitting on this Court. The constitutional doctrine which should now commend itself to the Court is the doctrine so powerfully expressed in the dissenting opinion in *Fay* (332 U.S. at 299-300):

> "there is a constitutional right to a jury drawn from a group which represents a cross-section of the community. And a cross-section of the com-

> munity includes persons with varying degrees of training and intelligence and with varying economic and social positions. Under our Constitution, the jury is not to be made the representative of the most intelligent, the most wealthy or the most successful, nor of the least intelligent, the least wealthy or the least successful. It is a democratic institution, representative of all qualified classes of people."

and in the dissenting opinion in *Moore* (333 U.S. at 570):

> "The vice lies in the very concept of 'blue ribbon' panels—the systematic and intentional exclusion of all but the 'best' or the most learned or intelligent of the general jurors. Such panels are completely at war with the democratic theory of our jury system, a theory formulated out of the experience of generations."

2. *Fay* and *Moore* have been eroded and undermined by the subsequent course of decision in this Court concerning the scope of the Fourteenth Amendment, so as to impose on the States an obligation to measure up to fundamental guaranties in the Bill of Rights. In *Fay* there were urged on the Court the prior holdings in *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 220, *Ballard* v. *United States*, 329 U.S. 187, 192, and *Glasser* v. *United States*, 315 U.S. 60, 83-86, to the effect that:

> "The American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a cross-section of the community . . . Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society . . . To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury."

The *Fay* majority (332 U.S. at 287-288) refused to apply these principles on the ground that they were applicable only in the federal courts. It held that, under *Palko* v. *Connecticut,* 302 U.S. 319, the Sixth Amendment's commandment of trial by jury in criminal cases is "not picked up by the due process clause of the Fourteenth" so as to become a limitation on the States and that "trial by jury may be modified by a state or abolished altogether."

The course of decision since *Fay,* however, has demonstrated that the commandments of the Bill of Rights "picked up" by the Fourteenth Amendment are far more extensive than the *Fay* majority recognized. Landmarks in this development have been *Gideon* v. *Wainwright,* 372 U.S. 335, overruling *Betts* v. *Brady,* 316 U.S. 455, with respect to the right to counsel; *Mapp* v. *Ohio,* 367 U.S. 643, overruling *Wolf* v. *Colorado,* 338 U.S. 25, with respect to unlawful search and seizure; *Malloy* v. *Hogan,* 378 U.S. 1, overruling *Adamson* v. *California,* 332 U.S. 46, with respect to the privilege against self-incrimination; *Pointer* v. *Texas,* 380 U.S. 400, overruling *Stein* v. *New York,* 346 U.S. 156, 195-196, with respect to the right of confrontation; and *Miranda* v. *Arizona,* 384 U.S. 436, overruling *Crooker* v. *California,* 357 U.S. 433, with respect to custodial interrogation.[9]

In view of these manifest shifts in constitutional doctrine, the underlying assumptions of *Fay* and *Moore*

[9] Recently the Court considered the question, in No. 45, *Cichos* v. *Indiana,* whether the Fifth Amendment's prohibition against double jeopardy is applicable to the States—i.e., whether any portion of *Palko* v. *Connecticut* survives at all—but after oral argument the Court decided that the case was not an appropriate one for reaching that issue, and the writ was dismissed as improvidently granted (November 14, 1966).

by now have been invalidated. This is true regardless of whether, as many Justices have believed (see *Malloy* v. *Hogan, supra,* 378 U.S. at 4), the Fourteenth Amendment incorporated the first eight amendments in their entirety, or whether instead a majority of the Court continues to accept a doctrine of somewhat more selective incorporation. See *Estes* v. *Texas,* 381 U.S. 532, 559-560. As the Court stated in *Pointer* v. *Texas, supra,* 380 U.S. at 406, "of course since *Gideon* v. *Wainwright, supra,* it no longer can broadly be said that the Sixth Amendment does not apply to state courts". The right at stake here—the right in a capital criminal case to trial by a jury drawn from a representative cross-section of the community—is no less fundamental that the rights which have been involved in the other cases referred to.

3. The outmoded constitutional doctrine adhered to by the New York Court of Appeals in order to affirm appellant's conviction is also in direct conflict with the principles expressed in a very recent decision of the United States Court of Appeals for the Fifth Circuit, *Labat* v. *Bennett,* 365 F. 2d 698, decided en banc August 15, 1966, rehearing denied, September 30, 1966.[10] There the Fifth Circuit's majority opinion (365 F. 2d at 719-720), in setting aside Louisiana state court convictions, held that "The exclusion of daily wage earners *as a class* violates the petitioners' due process and equal protection rights to an impartial jury representing a cross-section of the community." The concurring opinion on behalf of Judges Bell and Coleman (365 F. 2d at 739-742) is rested solely on this ground. It thus seems evident that, in the states comprising the

[10] This is a subsequent stage of *United States ex rel. Poret and Labat* v. *Sigler,* 361 U.S. 375.

Fifth Circuit, a state court blue ribbon jury system could not now survive the scrutiny of the Fifth Circuit. The result should not be different in a case coming from New York.

4. The *Fay* majority placed some reliance (332 U.S. at 285-286) on the fact that data there proffered concerning actual operation of the blue ribbon jury system consisted of New York Judicial Council studies for the period 1933-1934, instead of later years. But subsequent to *Fay* another Judicial Council study, made in 1952, fully confirmed the discriminatory and unfair operation of this New York special jury scheme, and its continued and inherent departure from the principle that juries should be drawn from a representative cross-section of the community. This pattern of discrimination is fully evident with respect to the particular special panels used in the present case (see p. 8, *supra*).[11] The result here was the selection of a jury from special panels composed of people likely to be unduly influenced by their moral predilections against this appellant (whom the evidence showed had consorted with prostitutes). As a result of the 1952 study, the Judicial Council then renewed its recommendation that special juries be abolished. (Excerpts from the 1952 Judicial Council Report and study are

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[11] Thus the 1952 study showed (see p. 55a, *infra*) that "the most significant difference between the special and general panel is occupational" and that "those who may be called working people . . . constitute a larger portion of the general panel than they do of the special panel". This discriminatory operation of the special jury was particularly marked in the present case (see p. 8, *supra*). The 1952 study likewise reported (see p. 57a, *infra*) that in New York County women constituted 2% of the special panel but 11% of the general panel; in this case too the exceptionally low representation of women (11 out of 400 in the two special panels) has been maintained (see p. 8, *supra*).

set forth at pp. 50a-57a, *infra,* of Appendix C.)[12] The deeper constitutional doubts raised by this 1952 study and Report once again spurred the movement for legislative reform (see, for example, the excerpt from the April 26, 1965 Report of the Committee on Criminal Courts, Association of the Bar of the City of New York, which we set forth at pp. 57a-58a, *infra,* of Appendix C). Meanwhile, post-*Fay* decisions in numerous other States had begun to give wholehearted endorsement to the principle that juries in criminal trials must be drawn from a representative cross-section of the community.[13] In New York, legislative reform was finally accomplished by New York Laws 1965, c. 778, § 3. This abolished the New York special

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[12] In an effort to obtain reexamination of *Fay,* these new materials were adduced in *Vanderwyde* v. *Denno,* 113 F. Supp. 918 (S.D.N.Y. 1953), affirmed on opinion below, 210 F. 2d 105 (2d Cir. 1954), certiorari denied, 347 U.S. 949. That case, however, arose prior to the various Fourteenth Amendment decisions we have cited (pp. 31-32, *supra*) and the State also contended (Br. Opp. in this Court, No. 447 Misc. of 1954 Term, pp. 6-7) that the question had never been properly presented in the state courts. Even despite these circumstances, which raised doubts whether the case was a suitable one for reaching the merits, Mr. Justice Black and Mr. Justice Douglas recorded their dissent from the denial of certiorari. In the present case, on the other hand, the various Fourteenth Amendment decisions have now intervened; the question clearly was properly presented and expressly decided in the state courts; and it comes to this Court on an appeal as of right.

[13] E.g., *People* v. *White,* 43 Cal. 2d 740, 752-753, 278 P. 2d 9, 17 (1954), certiorari denied, 350 U.S. 875; *Allen* v. *State,* 110 Ga. App. 56, 137 S.E. 2d 711 (1964); *State* v. *Ferraro,* 146 Conn. 59, 147 A. 2d 478 (1958), certiorari denied, 369 U.S. 880; *State* v. *Dodge,* 12 Utah 2d 293, 365 P. 2d 798 (1961); *Crawford* v. *State,* 408 P. 2d 1002 (Alaska, 1965); *State* v. *Madison,* 240 Md. 265, 272-273, 213 A. 2d 880, 885 (1965); *State* v. *Jones,* 44 Del. 372, 57 A. 2d 109 (Ct. Oyer & Terminer, 1947).

jury system effective September 1, 1965—a date which was, however, subsequent to appellant's trial and sentence.

5. The fact that New York has now abolished the blue ribbon jury system does not render the question presented by this appeal any the less substantial, particularly when the case comes here on an appeal as of right. The long-overdue legislative reform finally enacted in New York is of no avail to appellant, who has been sentenced to serve thirty years to life imprisonment after being tried under this unconstitutional jury statute. It is to this Court that appellant must look for corrective action. Moreover, a decision sustaining appellant's contention will give full notice to the comparatively small group of States which still authorize the use of special or struck juries in criminal cases[14] that such fundamentally discriminatory and unfair methods of selecting juries can no longer be tolerated under the Constitution. It will promote the sound administration of criminal justice for the States to know, by an unequivocal decision from this Court, that such undemocratic methods of jury selection are outlawed by the Constitution.

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[14] There appear to be six States which still have statutes authorizing the use of special or struck juries in certain criminal cases. Alabama Code, Appendix (Vol. 14), §§ 713-719 (counties with population of 400,000 or more); Delaware Code Ann., Title 10, §§ 4541-4543; Indiana Stat. Ann., §§ 4-3310 *et seq.* and § 9-1501; Michigan Stat. Ann., § 27A.1284 (1962 Revised Volume) (Wayne County); New Jersey Stat. Ann., §§ 2A:75-1 - 2A:75-7; Vermont Stat. Ann., Tit. 12, §§ 1471-1473.

II. THE PROSECUTION'S CONCEALMENT OF MATERIAL EVIDENCE AND ITS SPONSORSHIP OF FALSE TESTIMONY

The prosecution's sponsorship of false testimony and its concealment of material evidence useful to the defense—matters which we have detailed at pp. 9-24, *supra*—involve constitutional questions as grave as any which come before this Court in criminal cases.

The decision below shows how wide the gap can become between the principles this Court expresses and the purported application of those principles by State courts which are unduly reluctant to overturn convictions even after flagrant wrongdoing by the prosecution has been brought to light. Here the Court of Appeals majority has managed not merely to depart from, but to nullify, the standards this Court has so carefully articulated.

The applicable standards find their expression beginning with *Mooney* v. *Holohan,* 294 U.S. 103, and continuing through such later cases as *Alcorta* v. *Texas,* 355 U.S. 28, *Napue* v. *Illinois,* 360 U.S. 264, and *Brady* v. *Maryland,* 373 U.S. 83, which the court below misread (see pp. 8a-9a, *infra*) in regard to the constitutional standards governing the prosecution's obligations. Currently the Court has the subject under review in No. 27, *Giles* v. *Maryland,* which has been briefed and argued but not yet decided.[15] Accordingly, we shall not here undertake a detailed analysis of the authorities which would duplicate what the Court is already considering in *Giles;* instead we shall identify the points in this case at which New York's most seri-

[15] It will also be under further review in No. 250, *United States ex rel. Miller* v. *Pate,* which we understand is expected to be argued on the merits in January.

ous departures from applicable standards have occurred.

But first it is appropriate to say that no matter what the outcome in *Giles,* appellant's case presents a situation in which the constitutional violations are far more aggravated. Unlike *Giles,* there is here clearly false testimony which the prosecutor sponsored with knowledge of its falsity (see pp. 9-20, *supra*). Unlike *Giles,* there is no problem here as to whether the prosecution is to be charged with "constructive knowledge" of information known to officials in another county; here the information concealed was well known to the prosecutor and to the detectives working on this case under his direct supervision, who were themselves participants in the events involved (see pp. 12-24, *supra*). Also unlike *Giles,* there is no problem here as to whether the information concealed would have been admissible; here it would clearly have been admissible, and the bulk of it, particularly the portions relating to Mrs. Generazio (see pp. 9-20, *supra*), might well have proven devastating, in the eyes of the jury, to the case which the prosecutor so carefully built around his star witness Gloria. And also unlike *Giles,* here there is comparatively little which involves the question of how far the prosecution is chargeable for its own mere negligence in failing to investigate or inquire further; here, for the most part, the primary fault of the prosecution was that it acted so deliberately and so thoroughly in systematically concealing from the defense and from the jury important information which came into the prosecution's possession as a result of its investigations.

We do not mean, of course, that none of the episodes could be said to be the result of mere negligence on the

part of the prosecution. This may account for the concealment of Detective Kelly's ballistics report (pp. 23-24, *supra*). It may also be the category into which the McNair-Bennett matter (see pp. 22-23, *supra*) should be placed. But even to the extent that any of the prosecution's shortcomings as disclosed by this record are attributable to mere negligence, the law applicable to such situations now has become uniformly clear: "the deception that results from negligent nondisclosure is no less damaging than that which is a product of guile and . . . such nondisclosure entitles the defendant to relief." *Levin* v. *Katzenbach,* 363 F.2d 287, 290 (D.C. Cir. 1966), citing also decisions in accord by the courts of appeals of five other circuits.[16] No matter how generously this record is interpreted so as to give the prosecutor the benefit of every doubt with respect to his own conduct, the refusal of the New York Court of Appeals majority to order a new trial cannot be reconciled with this whole group of decisions. For that reason alone, review of this case is called for.

But the prosecution's conduct in this case went far beyond mere negligence. We have already shown the total lack of foundation for the Court of Appeals majority's conclusion that the testimony of Gloria and Detective Leman sponsored by the prosecution was not in fact false or perjurious (see pp. 19-20, *supra*). Even building on its erroneous premise, however, the Court of Appeals majority felt it necessary to acknowledge that it was not "in any way condoning the

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[16] *Barbee* v. *Warden,* 331 F.2d 842, 846 (4th Cir. 1964); *United States ex rel. Meers* v. *Wilkins,* 326 F.2d 135, 139 (2d Cir. 1964); *Ashley* v. *State of Texas,* 319 F.2d 80, 84 (5th Cir. 1963), certiorari denied, 375 U.S. 931; *United States ex rel. Thompson* v. *Dye,* 221 F.2d 763 (3rd Cir. 1955), certiorari denied, 350 U.S. 875; see also *Thomas* v. *United States,* 343 F.2d 49, 53 (9th Cir. 1965).

failure of the prosecutor to disclose affirmatively Dagmar's [Mrs. Generazio's] presence prior to the recantation and her story of the phone call" (p. 10a, *infra*). It nevertheless proceeded to engage in an elaborate and unconvincing whitewash of the prosecution's conduct. Thus it gives the prosecutor credit for disclosing that Gloria recanted (p. 10a, *infra*), but overlooks the fact that, by suppressing and distorting the entire occasion and cause of her recantation, the prosecution effectively concealed its significance.

The court (see p. 10a, *infra*) likewise greatly exaggerates what the defense had heard by way of a grapevine rumor (see p. 20, *supra*) about a story which someone named Dagmar Finch had furnished the prosecution concerning a phone call from Gloria. The opinion ignores the fact that the prosecution never informed the defense that Dagmar's married name was Mrs. Generazio, or that she was living in New Jersey (although the prosecution had been in virtually continuous contact with her). It also dismisses the fact that the prosecutor never informed the defense of what Mrs. Generazio had told the prosecution, or of her confrontation of Gloria, and that the prosecution had instead systematically concealed this information (see pp. 9-20, *supra*). It wholly disregards the principle that breach of a prosecutor's duty of disclosure is not excused because "more able, diligent or fortunate counsel might possibly have come upon the evidence on his own". *Levin* v. *Katzenbach, supra,* 363 F.2d at 291 (D.C. Cir. 1966); accord, *Barbee* v. *Warden, supra,* 331 F.2d at 845-846 (4th Cir. 1964); *United States ex rel. Meers* v. *Wilkins, supra,* 326 F.2d at 140 (2nd Cir. 1964).

The New York Court of Appeals majority's conclusion that the evidence which the prosecution concealed was, somehow or other, not material (pp. 10a-12a, *infra*) is an error of exceptional magnitude. The error resulted, as we have said, from the New York court's gross misapplication of the standards which this Court has articulated. Its effect was to defeat the principles of fairness and due process which are at the heart of the Fourteenth Amendment.

The extensive evidence which the prosecution here concealed from the defense and from the jury has been set forth (pp. 9-24, *supra*) in sufficient detail to make it plain that it related not merely to Gloria's credibility but also to other facts pertaining to the crime. Yet even if it had related only to Gloria's credibility, the one thing which *Napue* v. *Illinois, supra,* has established beyond doubt is that the principle prohibiting prosecution suppression, or prosecution sponsorship of false testimony, "does not cease to apply merely because the false testimony goes only to the credibility of the witness" (360 U.S. at 269).

The New York Court of Appeals majority sought to avoid the obvious applicability of *Napue* by saying that the defense already had attacked Gloria's credibility "so relentlessly" at the trial "that we cannot possibly see how the further challenge as to whether she made a phone call could possibly have affected the jury verdict" (see p. 11a, *infra*). But the fact that the defense already had made an attack on Gloria's credibility is no reason for sanctioning the prosecution's conduct in depriving the defense of the very specific ammunition which might have made all the difference to the jury. Mrs. Generazio's evidence concerning the phone call she had received from Gloria on

the alleged day of the murder (pp. 13-14, *supra*), and concerning Gloria's subsequent efforts to persuade Mrs. Generazio to "stick with her" (p. 13, *supra*), and concerning the confrontation between herself and Gloria which the prosecutor arranged in the District Attorney's office shortly before the trial and which produced such explosive results (pp. 14-17, *supra*)—all these were vital facts pertaining to Gloria's activities on the very day of the crime itself. They involved not merely Gloria's general credibility, but Gloria's credibility and her accuracy as to specific elements of the narrative which, as the prosecution's star witness, she had given to the jury to implicate appellant in the murder and which the jury evidently believed.

In the hands of the defense, this information which the prosecution so systematically and successfully concealed would have been invaluable in the effort to impeach Gloria, as well as to show what really happened. It also would have enabled the defense to offer the jury an opportunity to hear the testimony of Mrs. Generazio and to decide whether it gave rise to a reasonable doubt.

The New York Court of Appeals majority finally sought refuge (pp. 11a-12a, *infra*) in the position that Mrs. Generazio's evidence concerning the events which occurred on the alleged murder date, October 10, 1963, was not credible, and that the trial judge was justified in so finding after he had listened to Mrs. Generazio's testimony in the post-trial hearing. This is perhaps the most extreme departure in this case from what the Constitution permits. It is not for the judges to set themselves up as the final arbiters of what evidence is true and what is false; and this is particularly true, as Judge Fuld's dissent points out (p. 14a, *infra*), in a

case where "disclosure might well have impeached the one witness without whom there would admittedly have been no prosecution".[17]

The prosecutor may not make such decisions, and then conceal from the defense the portion of the evidence which, however helpful it might be to the defense, the prosecutor happens to think is false. As this Court said in *Brady* v. *Maryland, supra,* 373 U.S. at 88, this is a course of conduct which "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice." In similar vein, determination of the truth or the falsity of such testimony is no more the function of the judges than it is of the prosecutor; it is the proper function of the jury. This is what the Second Circuit, in setting aside another New York State court conviction in *United States ex. rel. Meers* v. *Wilkins, supra,* 326 F.2d at 140 (1964), ruled:

> "We cannot speculate as to the effect this testimony would have had on the jury if it had an opportunity to hear it. The jury was denied that opportunity by virtue of the prosecution's failure to acquaint defense counsel and the trial judge with the names of the witnesses."

The test, as this Court specified in *Napue* v. *Illinois, supra,* 360 U.S. at 272, is whether the evidence con-

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[17] The court also ignored the fact that the suppressed evidence would have been sufficient to require the submission to the jury of the issue whether Gloria was an accomplice, in which event her testimony was required to be corroborated (Section 399, New York Code of Criminal Procedure). Such an instruction had been requested by the defense (R. 2267-2268); it was refused by the trial judge, on the ground that there was no evidence that Gloria was an accomplice (see p. 32a, *infra*). The suppressed evidence would clearly have filled any such gap.

cealed or withheld by the prosecution "may have had an effect on the outcome of the trial." Or as the Fourth Circuit put it in *Barbee* v. *Warden, supra,* 331 F.2d at 847: "One cannot possibly say with confidence that such a defect in the trial was harmless." [18]

If these standards are to be followed and adhered to, appellant's conviction must be set aside and a new trial granted.

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[18] The effect of New York's formulation appears to be that, while issues of credibility are normally to be tried by the jury in criminal cases, nevertheless an exception exists which permits the judge to determine such credibility matters once and for all when, as here, the prosecution has suppressed or concealed or withheld material evidence until after the trial. This would be not only a fundamental invasion of the right to trial by jury and a violation of the Due Process Clause, but a violation of the Equal Protection Clause as well. For then the question would go not only to whether the Constitution requires a State to accord a Sixth Amendment type of jury trial to a defendant charged with murder (compare pp. 30-32, *supra*), but also "to the nature of the jury trial which the Fourteenth Amendment commands when trial by jury is what the State has purported to accord". *Turner* v. *Louisiana,* 379 U.S. 466, 471. It would involve a totally arbitrary and unreasonable classification. Compare *Baxstrom* v. *Herold,* 383 U.S. 107. It would take away a substantial portion of the benefits of trial by jury from those defendants, and only from those defendants, who had the misfortune to be victimized by the prosecution's wrongful conduct. Moreover, it would reward the prosecutor for indulging in such wrongful conduct. If the prosecutor's suppression were not detected, the conviction would stand; and if it were detected, the prosecutor would then obtain a determination solely from the judge, rather than from a jury, as to the credibility of the witness he concealed. Surely there is no room under the Constitution for such a scheme.

III. UNCONSTITUTIONAL SEARCH AND SEIZURE AND DENIAL OF HEARING

The search and seizure issues (pp. 24-26, *supra*) urgently call for this Court's further exploration and corrective action.

1. Even assuming Gloria's testimony about the chair (p. 25, *supra*) to be correct and conclusive, there are decisions which have held, on facts more compelling for the prosecution, that there was no "abandonment" for Fourth Amendment purposes. *Hobson* v. *United States,* 226 F. 2d 890 (8th Cir. 1955); *Work* v. *United States,* 243 F. 2d 660 (D.C. Cir. 1957); *United States* v. *Merritt,* 293 F. 2d 742 (3rd Cir. 1961). Moreover, as this Court said in *Jones* v. *United States,* 362 U.S. 257, 264, 266:

> ". . . we are dealing with carrying out an important social policy and not a narrow, finicky procedural requirement . . .
>
> "We are persuaded . . . that it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical."

See also *Stoner* v. *California,* 376 U.S. 483, 488.

2. In any event, under the Constitution appellant was at least entitled to a hearing on the unlawfulness of the seizure of the chair, and at such a hearing any factual issue of abandonment, if relevant, could have been fully explored and actually and reliably determined. The New York courts totally denied him such a hearing, despite a New York statute which re-

quired it[19] and despite a distinct understanding with the trial judge and the prosecutor that a hearing would be held (see pp. 25-26, *supra*). This contravened the most basic principles of due process and fair play. It plainly conflicted with *Jackson* v. *Denno,* 378 U.S. 368, where, in connection with New York's procedure for determining admissibility of confessions, this Court held that the defendant had a "constitutional right at some stage in the proceedings to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness" (378 U.S. at 376-377)—"a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined" (378 U.S. at 380). Certainly the applicable principles can be no different for unlawful search and seizure.

Appellant should have been accorded a fair hearing in which both the lawfulness of the seizure and the underlying factual issues, including any claim that he abandoned the seized property, were "actually and reliably determined." It was in effect so decided by the Ninth Circuit's decision in *Cunningham* v. *Heinze,* 352 F. 2d 1, 3 (1965), certiorari denied, 383 U.S. 968, holding the defendant there was entitled to an evidentiary hearing on underlying factual issues concerning consent to the search given by a third party " 'unless the state-court trier of fact has after a full hearing re-

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[19] Section 813-d3 of the Code of Criminal Procedure (see p. 49a, *infra*) provides that when a motion to suppress evidence is made during trial, the court shall hold a hearing thereon in the absence of the jury and decide all issues of fact and law. This statute was regarded as "necessary" to "implement" this Court's decision in *Mapp* v. *Ohio,* 367 U.S. 643 (1962 Report of New York Temporary Criminal Code Commission on Revision of the Penal Law and Criminal Code; Memorandum of Governor filed with Assembly Bill No. 160, Ch. 954, April 29, 1962).

liably found the relevant facts.' *Townsend* v. *Sain*, 372 U.S. 293, 313."

The trial court never even intimated during the trial that it was basing its ruling on the ground that the chair had been abandoned; its abandonment theory first appeared in its opinion denying the motion for new trial (p. 26, *supra*). If the abandonment issue had been raised, Gloria could have been fully cross-examined on it. Moreover, if the court had proceeded to conduct the hearing it was obligated and had committed itself to conduct, then appellant, besides adducing other evidence, could have testified in the absence of the jury as to whether he had abandoned the chair or whether the chair had merely been placed in storage for him. Denial of the hearing prevented appellant, who was the only other party to the alleged conversation, from testifying as to what occurred. A trial judge who has absolutely refused to conduct such a hearing cannot justly determine that abandonment occurred. A State court criminal proceeding which rides roughshod over the right to a hearing should not be allowed to stand.

3. Even assuming the New York courts were correct in postulating an abandonment and in upholding the denial of a hearing, an important constitutional question is presented as to whether appellant nevertheless does not have standing to challenge the unconstitutional search and seizure. Standing to challenge unconstitutional searches and seizures is a significant recurring question in the administration of the criminal law. Now that the Fourth Amendment's exclusionary rule is applicable to the States, *Mapp* v. *Ohio*, 367 U.S. 643, this question has large implications not only for the federal courts but for all the state court systems throughout the nation.

But at present, marked conflict exists in the decisions on standing. This conflict is most evident in situations where the defendant, although he does not have a property-type interest, is the person against whom the unconstitutional search and seizure was specifically directed. In *Jones* v. *United States, supra,* 362 U.S. at 261, this Court, while it was able to rest its ground of decision on possessory considerations, also declared a defendant does have standing if he was the target of the search and seizure—that is, if he was the victim of the search or "one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." Since *Jones,* the principle that a defendant may challenge as unconstitutional a search and seizure aimed at obtaining evidence for use against him, has been applied by a number of the federal courts of appeals. *Diaz-Rosendo* v. *United States,* 357 F. 2d 124 (9th Cir. 1966); *United States ex rel. Coffey* v. *Fay,* 344 F. 2d 625 (2d Cir. 1965); *Henzel* v. *United States,* 296 F. 2d 650 (5th Cir. 1961); *Rosencranz* v. *United States,* 334 F. 2d 738, 742 (1st Cir. 1964) (concurring opinion); see also *Dean* v. *Fogliani,* 81 Nev. 541, 407 P. 2d 580 (1965). Similarly, it has been held that evidence which is inadmissible against one defendant, because obtained as a result of an illegal search and seizure of that defendant's property, is also inadmissible against other defendants indicted for the same offense, even though the other defendants lacked a proprietary interest in the premises searched or property seized. See *McDonald* v. *United States,* 335 U.S. 451; *Rosencranz* v. *United States,* 334 F. 2d 738 (1st Cir. 1964); *Rosencranz* v. *United States,* 356 F. 2d 310 (1st Cir. 1966); *Hair* v. *United States,* 289 F. 2d 894 (D.C. Cir.

1961). Moreover, California and Illinois have advanced well beyond the position that the defendant need even be the target of the search; they have held a defendant has standing to challenge the admissibility of evidence produced by an illegal search and seizure, irrespective of whether the particular defendant had any kind of possessory interest or was the target of the search. *People* v. *Martin*, 45 Cal. 2d 755, 290 P. 2d 855 (1955); *People* v. *DeFilippis*, 34 Ill. 2d 129, 134-135, 214 N.E. 2d 897, 900 (1966).

On the other hand, a number of courts have, even since *Jones* and *Mapp*, refused to recognize the rule that a defendant has standing to challenge an unconstitutional search and seizure which was directed against him, and have insisted on a property interest in the premises searched or the property seized.[20] By the decision below (p. 3a, *infra*), New York now has joined these ranks and, as above indicated, gone even further. The effect of these narrow readings has been to utilize the doctrine of no-standing as a handy means for circumventing the policies which *Mapp* and succeeding cases are intended to effectuate.[21]

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[20] See *State* v. *Edwards*, 197 Kan. 146, 415 P. 2d 231 (1966); *Cain* v. *State*, 113 Ga. App. 477, 148 S.E. 2d 508 (1966); *State* v. *Montagne*, 18 Utah 2d 38, 414 P. 2d 958 (1966); *Henley* v. *State*, 387 S.W. 2d 877 (Tex. Cr. App. 1964); *Vannerson* v. *State*, 403 S.W. 2d 791 (Tex. Cr. App. 1966); *Sanders* v. *State*, 278 Ala. 453, 179 So. 2d 35 (1965); *Head* v. *State*, 246 Miss. 203, 136 So. 2d 619 (1962), certiorari denied, 371 U.S. 910; *Fox* v. *State*, 214 Tenn. 694, 383 S.W. 2d 25 (1964), certiorari denied, 380 U.S. 933; cf. *United States* v. *Konigsberg*, 336 F. 2d 844, 845-847 (3rd Cir. 1964), certiorari denied, 379 U.S. 930.

[21] It should be noted that *Wong Sun* v. *United States*, 371 U.S. 471, 491-492, is inapposite. There the holding that the evidence was admissible against one defendant (although not against another) was based on the fact—as was recognized in *Rosencranz* v. *United States, supra*, 334 F. 2d at 741—that it had come lawfully into the Government's possession with the consent of its proprietor (Yee).

The exclusionary rule is "calculated to prevent, not to repair"; its purpose "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Linkletter* v. *Walker,* 381 U.S. 618, 633. But the New York result not only condones, it also encourages, police disregard of the requirements of the Constitution. Particularly in view of the recurring nature of the problem, this Court should now resolve the confusion and conflict which so manifestly exists. This Court should make it clear that, at the very least, a defendant against whom an unlawful search and seizure was directed has standing to object to, and cannot be convicted on the basis of, evidence obtained by means thereof, regardless of whether he has technical property rights in the property seized.

This search and seizure was directed specifically at supporting the police's case against appellant, whom the police already had arrested. Nor was there the slightest showing of necessity or emergency to justify this arbitrary and unreasonable seizure. The police had seen the chair in the warehouse about two weeks before (R. 1536), and had had ample time to apply for a search warrant if they thought they were entitled to one.

The teaching of the decision below for the New York police—one of the largest police forces in the world—is that any search and seizure conducted in contempt of the Constitution will nevertheless get by if afterwards it can be shown that the defendant does not have an interest in the premises searched or the property seized. "Moreover, such a limitation virtually invites law enforcement officers to violate the rights of third parties and to trade the escape of a criminal

whose rights are violated for the conviction of others by the use of the evidence illegally obtained against them." *People* v. *Martin, supra,* 45 Cal. 2d at 760, 290 P. 2d at 857.

IV. DENIAL OF PRE-TRIAL INSPECTION OF BULLETS

The traditional view that denials of pre-trial discovery lack constitutional dimension is anomalous and unjust. Compare Brennan, "The Criminal Prosecution: Sporting Event or Quest for Truth," [1963] Washington U.L.Q. 279, 285; Goldstein, "The State and the Accused: Balance of Advantage in Criminal Procedure," (1960) 69 Yale L.J. 1149, 1180 *et seq.* It urgently requires reconsideration by this Court.

The Court this year enlarged discovery rights in federal criminal trials in the 1966 amendment to Rule 16, Federal Rules of Criminal Procedure. With this recent advance in the law, the question of the constitutional obligations of the States should now be given fresh consideration. *Cicenia* v. *Lagay,* 357 U.S. 504, 510-511 (superseded in other respects by *Miranda* v. *Arizona,* 384 U.S. 436, 479) acknowledges that discovery is "the better practice". Since *Cicenia* found "absence of a showing of prejudice to the defendant", this suggests that, where prejudice is shown, the Court might well hold a constitutional right has been violated.

Here the prejudice was clearly shown. Appellant's inspection of the bullets before trial was important to the preparation of his defense (see pp. 26-27, *supra*). It was important to "the scales [being] evenly balanced in his contest with the state". See Brennan, *loc. cit. supra,* at 285; Goldstein, *loc. cit. supra,* at 1192. The murder weapon or weapons never were found, so that

the bullets were of crucial importance. The impression conveyed to the jury by the prosecution's expert witness that all four bullets had been fired from one firearm would, in all likelihood, have been disproved if such discovery had been permitted (see p. 27, *supra*). Moreover, evidence tending to show that there was more than one weapon would have compelled submission to the jury of the requested accomplice instruction with respect to Gloria (see p. 42, *supra*, note 17). Nor could the legitimate interests of the prosecution have been prejudiced by the granting of such limited discovery.

The circumstances make this murder case a most appropriate vehicle for articulating the limitations which the Due Process Clause imposes on the States in the interests of achieving a substantial degree of fundamental fairness in this area.

V. PREJUDICIAL PUBLICITY

Police and prosecution actions in instigating a torrent of prejudicial publicity (see pp. 27-28, *supra*) deprived appellant of a fair trial, under the standards which this Court has so thoroughly reviewed in its recent opinion in *Sheppard* v. *Maxwell*, 384 U.S. 333, decided after the present case was briefed and argued in the Court of Appeals. Here the situation plainly was one where the poisoning of the atmosphere could not be adequately cured by the trial judge's instructions or admonitions to the jury during the course of the trial. Compare *Irvin* v. *Dowd*, 366 U.S. 717, 727-728; *United States ex rel. Bloeth* v. *Denno*, 313 F. 2d 364 (2d Cir. 1963), certiorari denied, 372 U.S. 978.

The Court of Appeals sought to dispose of appellant's contention on the grounds (1) that the publicity

in question for the most part took place at the time of the arrest, nearly eight months prior to trial, (2) that four months prior to trial defense counsel had argued that appellant was ready to go to trial, and (3) that appellant had not sought a change of venue (pp. 2a-3a, *infra*). None of these grounds is adequate. Both separately and together, they show that the New York courts are unprepared to accept the minimum due process standards expressed in this Court's decisions. Thus, to say that most of the prejudicial publicity took place at the time of arrest (on February 21, 1964) is to ignore both the lurid June 1964 magazine articles (p. 28, *supra*) and the prejudicial publicity during the trial itself (p. 28, *supra*). To give weight to the fact that in June defense counsel had said appellant was prepared to go to trial is to ignore the entire reason why this occurred—namely, that appellant had then been incarcerated without bail for over three months and appellant's only alternative to a speedy trial appeared to be to remain in prison for an indefinite period of time until the prosecution was ready to proceed (R. 47A-157A). Finally, the fact that a change of venue was not sought can hardly be held to be a waiver of appellant's constitutional right to a fair trial. There is no New York statute which so provides; and waivers of basic constitutional rights are not to be so easily implied. *Johnson* v. *Zerbst*, 304 U.S. 458, 464; *Brookhart* v. *Janis*, 384 U.S. 1, 4-8. While it may be one factor to consider in determining whether prejudice actually existed, appellant's failure to make such a motion cannot be dispositive of the federal constitutional claim. *Stroble* v. *California*, 343 U.S. 181, 193-194. The ultimate test under the Consti-

tution must be whether the trial was actually a fair one by Due Process Clause standards.[22]

Moreover, as we have said, the Court of Appeals wholly ignored the prejudicial publicity during the trial itself, when it was too late to change the venue. Even if the juror's word be accepted that although he saw the particular article but did not "read" it (p. 28, *supra*), his glancing at it would have been sufficient to convey its adverse tenor. Thus, the courts have given proper recognition to the fact that "the average juror" is often honestly unaware of "the unconscious influence of his preconceptions as to probable guilt", *Delaney* v. *United States,* 199 F. 2d 107, 112-113 (1st Cir. 1952), and that, even on the conscious level, "There is no certainty that all jurors would volunteer information about violating the admonitions or admit that they were influenced by the publicity." *United States* v. *Accardo,* 298 F. 2d 133, 136 (7th Cir. 1962), citing *Coppedge* v. *United States,* 272 F. 2d 504, 508 (D.C. Cir. 1959).

This case presents important and novel aspects of prejudice through police-inspired and prosecution-inspired publicity—matters which should be resolved by this Court. And at the very least, the case should be remanded on this question for reconsideration in the light of *Sheppard* v. *Maxwell, supra.*

CONCLUSION

This appeal comes here on a lengthy record. What stands out as unusual in this case, when the lengthy record has been sifted, is the imposing array of seri-

[22] Thus in *Moore* v. *Dempsey,* 261 U.S. 86, no motion had been made for change of venue.

ous constitutional questions raising vital issues concerning the standards which the States—through their legislatures, their courts and their prosecutors—must accept and conscientiously apply if the Constitution is to be truly the law of the land. These are questions having a public importance which far transcends the interest of this appellant alone.

For the reasons we have set forth, the Court should note probable jurisdiction, without limitation, and should give consideration to the merits so as to lead to reversal of the judgment below.

Respectfully submitted,

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November 1966

APPENDIX A

OPINIONS AND JUDGMENT BELOW

Opinion of New York Court of Appeals, Nov. 7, 1968

STATE OF NEW YORK
COURT OF APPEALS

I. No. 511. 68

THE PEOPLE &c., *Respondent*

vs.

MAX FINE, *Appellant*.

KEATING, J.:

On November 8, 1963, a Harlem River drawbridge operator spotted a body later identified as Rubin Markowitz, a bookmaker, floating in the river. The last known contact with the deceased was a telephone call to him at 1:30 p.m. on October 10, 1963. Death was caused by four .22 caliber bullet wounds.*

The defendant is a business man with a wife and three children living in comfortable circumstances but also addicted to gambling and associating with prostitutes. He maintained an apartment on 53rd Street under the fictitious name of "Weissman" for his extra-marital activities and contributed large amounts to the support of a prostitute known by numerous aliases but hereinafter referred to as Gloria Kendal, Gloria, who procured entertainment for defendant's friends as well as engaging in prostitution herself, was the primary witness for the prosecution.

In essence, her testimony—and the People's case—was that sometime after 3:00 P.M. on October 10, 1963, defendant telephoned her (Gloria lived on 53rd Street) from the Weissman apartment and urgently requested her pres-

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* For a fuller statement of the facts, see the opinion below (24 A.D. 2d 32).

APPENDICES

APPENDIX A

OPINIONS AND JUDGMENT BELOW

Opinion of New York Court of Appeals, July 7, 1966

STATE OF NEW YORK
COURT OF APPEALS

1. No. 511. 65

THE PEOPLE & c., *Respondent*

vs.

MARK FEIN, *Appellant.*

KEATING, J.:

On November 8, 1963, a Harlem River drawbridge operator spotted a body later identified as Rubin Markowitz, a bookmaker, floating in the river. The last known contact with the deceased was a telephone call from him at 4:00 p.m. on October 10, 1963. Death was caused by four .22 caliber bullet wounds.*

The defendant is a business man with a wife and three children living in comfortable circumstances but also addicted to gambling and association with prostitutes. He maintained an apartment on 63rd Street under the fictitious name of "Weissman" for his extra-marital activities and contributed large amounts to the support of a prostitute known by numerous aliases but hereinafter referred to as Gloria Kendal. Gloria, who procured entertainment for defendant's friends as well as engaging in prostitution herself, was the primary witness for the prosecution.

In essence, her testimony—and the People's case—was that sometime after 5:00 P.M. on October 10, 1963, defendant telephoned her (Gloria lived on 73rd Street) from the Weissman apartment and urgently requested her pres-

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* For a fuller statement of the facts, see the opinion below (24 A D 2d 32).

ence. She complied and upon her arrival he exhibited a trunk, admitting that he had shot his bookmaker, to whom he owed money from the recent World Series, and stuffed the body into the trunk. After defendant pleaded for her assistance, Gloria called a friend, David Broudy, who immediately left his Bronx apartment. In the meantime she asked defendant if he were sure Ruby was dead. Defendant allegedly responded in the affirmative and lifted the trunk lid exposing part of an arm, some new clothesline and some white material that looked like a shirt.

In addition to Broudy, a Miss Geri Boxer, who was to have picked Gloria up at the latter's apartment but was told by one Sandra Ede that Gloria was at the Weissman apartment, appeared at the apartment. These two, along with Gloria, loaded the trunk into a station wagon rented by defendant and drove to Gloria's apartment. Gloria went inside for a while and then returned to the others outside. The three then drove around, finally stopping on Harlem River Drive and throwing the trunk into the river. Gloria also threw in two duffle bags, one of which contained pieces of carpet from the apartment.

Defendant was convicted upon a jury verdict of Murder in the Second Degree and sentenced to State Prison for thirty years to life. After a full post-trial hearing, defendant's motion for a new trial was denied. The Appellate Division affirmed the judgment.

Defendant's contention that the use of a special jury deprived him of his constitutional right to a fair trial has been considered before and found to be without merit. *Fay* v. *New York* (332 U.S. 261) and *Moore* v. *New York* (333 U.S. 565).

Similarly, the record fails to support defendant's claim that unfavorable publicity aroused such prejudice in the community that he was deprived of a fair trial. The publicity in question for the most part took place at the time of arrest, nearly eight months prior to trial. Defendant's own

counsel argued on a habeas corpus hearing four months prior to trial that the effect of publicity had long since passed and defendant was ready to go to trial. Finally, defendant never even sought a change of venue. (See *Stroble* v. *California*, 343 U.S. 181.)

Defendant next urges that the seizure by police of a chair from a warehouse and its introduction into evidence violated his constitutional rights. The chair in question had been in the Weissman apartment at the time of the murder. The serologist who examined and tested the chair reported that signs of human blood were present on the chair. However, there were insufficient stains present to group or type the blood.

We find that even if this objection was properly preserved, it has no merit. The facts show that defendant voluntarily relinquished all right, title and interest to the chair with an intention of terminating forever his ownership in it. Defendant abandoned his interest and retained no rights in the chair which could be breached by its subsequent seizure by law enforcement officers.

Defendant also argues that the Appellate Division abused its discretion in failing to consider his appeal from the denial of his motion for a new trial on the ground of newly-discovered evidence. It is clear, however, from the opinion of the Appellate Division (24 A D 2d 32) that the alleged newly-discovered evidence was fully considered by the court and found insufficient to warrant a new trial.

Moreover, it is well-settled that this Court has no power in a non-capital case to review the discretionary order denying a motion for a new trial. The right to a review of such an order ceases at the Appellate Division. (*People* v. *Bonifacio*, 190 N.Y. 150; *People* v. *Luciano*, 275 N.Y. 547; *People* v. *Girardi*, 303 N.Y. 887; *People* v. *Mistretta*, 7 N.Y. 2d 844.)

Although the evidence brought out at the post-trial hearing on the motion for a new trial would, therefore, not normally be before us, since the hearing was so complete

and extensive evidence was taken, much of which could be considered on a coram nobis, we have considered the merits of defendant's evidence.

The only serious question which arises from this evidence concerns defendant's contention that facts brought to light at the post-trial hearing establish a failure of the prosecution to disclose material exculpatory evidence, thus denying defendant a fair trial. Specifically, defendant points to four instances of alleged suppression: the ballistics report of Detective Kelly, the testimony of Sandra Ede, the testimony of Mrs. McNair and Mrs. Bennett, and the testimony of Mrs. Generazio.

The objection in the first instance has little substance. The Kelly report of an inconclusive naked eye examination was in no way contradictory to, but was fully superseded by, the microscopic examination and analytic tests by Detective O'Brien who testified and was subject to cross-examination. Both the O'Brien report and the Kelly report were in the physical possession of the court during the entire trial pursuant to a subpoena by defendant and were fully available to defendant. In short, there was neither suppression of evidence nor was the evidence in question exculpatory. (See *Jordon* v. *Bondy*, 114 F.2d 602.)

Similarly, the testimony of Sandra Ede, a prostitute who spent a good deal of time in Gloria's apartment and frequently took messages, was in no way suppressed. Sandra, who was under psychiatric care when she testified at the post-trial hearing, consistently advised all representatives of the prosecution that she could not recollect the events of October 10, 1963.

Faced with an unstable and uncertain witness, whose testimony would add nothing to his case, the prosecutor cannot be faulted for choosing not to call her to the stand. However, he did the next best thing in providing the defense with the information. At the close of his case, the District At-

torney in open court recalled who Sandra was and stated that since she claimed to have no recollection, he was not calling her to the stand. He then gave her name and address to defense counsel so they could do whatever they wanted with it. Defense counsel, who already knew about Sandra, chose not call her either. Clearly, evidence is not suppressed when the defendant has such a knowledge of it.

Mrs. McNair and her daughter Mrs. Bennett lived two floors below the Weissman apartment. Defendant claims that their testimony that they heard shots from the rear of the building (the Weissman apartment was towards the front) on the day of the murder was suppressed by the People. Again, the questions are presented as to whether there was suppression and whether the evidence was exculpatory.

Mrs. Bennett told the investigators that she dated Mr. Kassow (one of the original lawyers for defendant) and had told him of hearing the shots and of seeing a trunk in the apartment lobby prior to the murder. Mr. Kassow himself testified that Mrs. Bennett had told him of seeing the trunk but when he asked her if she had heard any shots, she replied in the negative.

The testimony is conclusive that, regardless of what Mrs. Bennett *actually* told Mr. Kassow, the district attorney had no reason to believe that he knew anything that defendant did not know. Moreover, the trial court found, and we concur, that these women possessed no exculpatory evidence. The prosecutor and Detective Leman testified that the women told them by word and hand gestures that the shots had come from up and towards the front of the building, which corresponded to the Weissman apartment. The women had little knowledge of guns or gun shots yet they claimed to have heard from the alley three floors below—through an open window—four very loud sounds which scared them and which they were certain came from a gun; this despite the fact that .22 caliber shots make a comparatively small re-

port. The words of the trial judge, who had an opportunity to observe these witnesses, best sum up their testimony:

> "Taking their credible testimony in the most favorable light, each testified that some time in late September or early October 1963, they heard four to six loud noises which came through their living room window . . . late in the afternoon. I find no basis for believing that they recognized the sounds as gunshots, partly because Mrs. Bennett long ago denied hearing shots when questioned by the defendant's first attorney of record, Mr. Kassow, and partly because of their lack of expertise. Mrs. Bennett's recollection that she only discussed having seen a large steamer trunk in the lobby of the building during the same period—but not the 'shots' because of the trial assistant's request that she not discuss it with anyone, is completely inconsistent with her demeanor at the hearing. This voluble witness was simply incapable of restricting her desire to talk."

The Judge further noted that they misdated their interview by several months, failed to remember their description of the trunk from one week to the next, and that the only probable explanation for inconsistencies in various testimony was that they told the prosecutor an entirely different story from that which they recollected at the hearing. The prosecutor, having been told by the witnesses that defendant's attorney was informed and the information being *at best* very tenuous, could not be expected to come forward with the pointless task of repeating that information.

The defendant's claims with regard to Detective Kelly, Sandra Ede and the Bennett-McNair testimony are perfect examples of why the public prosecutor—an experienced trial lawyer—must have *some* area in which he is permitted to judge, in the context of the entire case, the value of evidence to the defense in terms of its potential impact on the jury; he must have *some* discretion in determining which evidence must be turned over to the defense. These claims are examples of why no court has ruled that *every* statement obtained by the district attorney or the results of *every*

avenue of investigation pursued by him must be disclosed to the defense regardless of its materiality, credibility or potential impact on the trier of fact. As Judge Hastie has stated in a frequently cited passage (*U.S. ex rel Thompson* v. *Dye,* 221 F.2d 763, 769 (3rd Cir. 1955), cert. denied 350 U.S. 875), there are many situations in which a prosecutor can fairly keep to himself his knowledge of available testimony which he views as mistaken or false. But there are other circumstances in which a prosecutor should know that even testimony which he honestly disbelieves is of a type which in all probability would make it very persuasive to a fair-minded jury. It is not every case in which the prosecution must reveal the availability of testimony inconsistent with government contentions, but in special circumstances non-disclosure may amount to fundamental unfairness in a criminal trial.

With regard to Mrs. Dagmar Finch Generazio, defendant claims not only the suppression of her testimony but also the countenancing by the prosecution of false testimony by two of its witnesses regarding a confrontation between Gloria and Dagmar preceding a recantation by Gloria. He argues that this additional fact of false and perjurious testimony automatically requires a new trial under our decision in *People v. Savvides* (1 N.Y. 2d 554).

Dagmar Finch Generazio was a prostitute friend of Gloria Kendall whom Gloria allegedly called on the day of the murder seeking a car to move a box. During the investigation Dagmar told the prosecution varying stories as to the time she received the call but mainly told them that it was after 6:00 P.M. She had claimed to be in Gloria's apartment that afternoon to meet a man but when he did not appear, she left around 4:00 P.M. According to her story she went to Gail Weiner's apartment (where she allegedly received the call) arriving there between 6:00 and 7:00. At the post-trial hearing, however, she testified that she was in Gail's apartment and was certain she received Gloria's call there between 3:00 and 4:00.

At the close of Gloria's direct testimony, the prosecutor called defense counsel to the bench and there made a statement for the record. In this statement he explained that twice in the course of his investigation Gloria had recanted her testimony about hearing defendent admit the shooting and seeing the body in the trunk. The first recantation does not concern us as there is no question raised concerning it. With regard to the second, the prosecutor said that on September 28, 1964, in his office, Gloria had recanted and on September 30 she said she had lied two days previously. This information was provided so that defense could cross-examine Gloria about it.

It appears that prior to the second recantation Dagmar had been brought to the District Attorney's office and there confronted Gloria with the story that Gloria had called Dagmar at Gail's apartment some time between 6:00 and 7:00 or possibly later. Gloria denied the call, called Dagmar a liar and then started yelling and screaming that Detective Leman was getting people to lie about her. The detective took Dagmar from the room and Gloria demanded to call her lawyer. Thereafter Gloria recanted for the second time and it is with regard to these circumstances that the defendant charges the prosecution with countenancing false testimony.

In the first place, the record amply sustains the finding of the court below that the testimony in question was not in fact false or perjurious (see 24 A D 2d 42). While it may be that Gloria and Detective Leman failed to disclose the presence of Dagmar prior to Gloria's recantation, nowhere in their testimony can we find statements actually false or perjurious.

Moreover, the mere labelling of testimony as "false" does *not* change the nature of the inquiry and require an automatic reversal. Whether the charge be false testimony or suppression of exculpatory evidence, the principles are the same. The defendant is entitled to a fair trial without

trickery or overreaching by the prosecution, and the question is whether the prosecutor's conduct negated that right. The principle is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused (*Brady* v. *Maryland*, 373 U.S. 83, 87).

While the principles governing false testimony and suppression are similar, it may be that the tests will differ slightly because intentional false testimony will sometimes be conclusive evidence that defendant was denied a fair trial. For example, in a case like *Savvides* where the prosecutor knows of a blatant lie by a witness on a material issue, it is clear that defendant's trial has not had that element of fairness which our justice demands. The resulting prejudice to *Savvides* could not be characterized or discounted as harmless (*Savvides, supra* at 557). Likewise, there will be cases of suppression equally offensive to our sense of justice for the same reason. As Judge Friendly has concluded,

> "the strictness of the application of the harmless error standard seems somewhat to vary, and its reciprocal, the required showing of prejudice, to vary inversely, with the degree to which the conduct of the trial has violated basic concepts of fair play." *Kyle* v. *U.S.*, 297 F.2d 507, 514.

Our approach is in accord with that of the United States Supreme Court. In *Napue* v. *Illinois* (360 U.S. 264), where the district attorney failed to correct his witness' false testimony that he had received no promise of consideration, the court made its own examination of the facts and the importance of the testimony. The court's own statement of its holding indicates there is no rule of automatic reversal:

> "As previously indicated, our own evaluation of the record here compels us to hold that the false testimony used by the State in securing the conviction of petitioner may have had an effect on the outcome of the trial." (360 U.S. at 272.)

Similarly, our examination is directed at the prejudice caused to defendant and the effect on the outcome of the

trial by the possible concealment of, or misleading testimony regarding, Dagmar Generazio.

It should be noted, on behalf of the district attorney, that Dagmar's story of receiving a phone call from Gloria at Gail Weiner's apartment was steadfastly denied throughout the pre-trial investigation by both Gloria and Gail, and, even if true, fitted with the prosecution's theory that Gloria may have called Dagmar while she was in her apartment and Broudy and Boxer were outside in the station wagon with the trunk. Moreover, defendant knew about Dagmar and her story of a phone call and even cross-examined Geri Boxer with regard to her knowledge of Dagmar. In fact, defendant's investigator mentioned to Detective Leman in a hallway conversation that defendant knew of the phone call, and he even asked whether the prosecutor was going to put Dagmar on the stand.* Thus, the prosecutor had good reason for failing either to see anything of an exculpatory nature in Dagmar's testimony or to perceive the defense's inability to locate her.

As a matter of fact, under the difficult circumstances of this entire case, the district attorney and his staff—in turning over Sandra Ede's name, offering the evidence of Gloria's recantations, and correcting various testimony by Gloria just to mention a few instances—have combined a strong sense of fairness with a high degree of expertise.

Concealment or non-disclosure, however, is not ruled out by the good faith of the prosecutor, and, without in any way condoning the failure of the prosecutor to disclose affirmatively Dagmar's presence prior to the recantation and her story of the phone call, our decision must rest on an examination of the evidence involved, its materiality

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* The testimony indicates that when Leman asked if the investigator had called Dagmar's mother in Baltimore, the latter requested the mother's number but was refused. There was *no* request for the name, address or phone number of Dagmar nor any indication that the defense could not locate her.

and prejudicial effect, and most important, its possible effect on the jury. (*People* v. *Kingston*, 9 N.Y. 2d 384, 387; *People* v. *Rosario*, 9 N.Y. 2d 286, 291; Code of Criminal Procedure, section 542.)

Even *if* the jury had chosen to believe that Gloria's recantation resulted from what Dagmar said rather than her anger at Detective Leman, the effect of Dagmar's testimony would only have been to challenge Gloria's credibility. This the defense attacked so relentlessly at trial that we cannot possibly see how the further challenge as to whether she made a phone call could possibly have affected the jury verdict.

The defense questioned her along her entire road of deviation from the moral norm, while the prosecution made no effort to counter or mitigate this. The prosecutor himself, in summation, referred to Gloria as "infamous," "notorious," "the morals of an alley cat," "a moral leper," and "an old whore." Yet the jury apparently considered the various corroborating witnesses such as Geri Boxer and David Brandy and the circumstances of defendant's rental of the station wagon and his meeting with the deceased, and believed just enough of Gloria's testimony to convict defendant. We fail to see how Dagmar's evidence could have changed this.

The trial judge who had an opportunity to hear and study Dagmar and her testimony, made certain findings regarding her evidence and we cannot improve on his expression of those findings:

> "Having seen and heard this witness, I reject her testimony as totally unworthy of belief. While under oath at the hearing, she strained with tireless effort to avoid telling the truth, whether the examination covered her recorded criminal past, the date of her marriage, the frequency which the police telephoned her, or the reaction of Gale Weiner Tracy, a witness called by the prosecution after she submitted a sworn question and answer on behalf of the defendant, upon a certain con-

> frontation. The foregoing are all measurable standards, but of no greater import than the impression this witness created when set against less tangible marks. I find that she never told the prosecution of receiving a call on any afternoon, I further find that insofar as this witness' credibility is concerned, her story that she received any call from Mrs. Lazarus [Gloria] on the day, or month, of the killing does not warrant belief."

Though there are cases holding it to be of no consequence that evidence in question bore upon the prosecution witness' credibility rather than directly upon defendant's guilt, here the chain from the evidence to the prosecution witness is quite indirect and must first bridge the gap of Dagmar's incredibility. Even then it is either cumulative or peripheral. In no case cited by defendant, where the failure to call attention to evidence has required a new trial, has the evidence been so remote from the issue of guilt or so speculative.

The evidence here was not evidence which would have had an effect on the jury's determination. The prosecutor's act did not deprive defendant of a fair trial and the People's conduct of the case was not so contrary to fundamental concepts of justice as to constitute a denial of due process.

Defendant's remaining arguments were adequately dealt with in the courts below and we find no merit to them. Defendant has had one fair trial and we have found no defect or error requiring a reversal or a grant of a second trial.

The judgment of the Appellate Division should be affirmed.

FULD, J. (dissenting):

I am reluctant to vote for affirmance in this case in view of the conceded nondisclosure and concealment by the prosecution of evidence which, in my judgment, might well have persuaded the jurors to reach a different verdict. Although the defendant points to several such items, I direct myself to but one of them. The record reveals that a Mrs. Dagmar Generazio had given the prosecution information which was at odds with the trial testimony of the People's key witness, Gloria Kendall, and that such information had not been disclosed to the jury or to the defense. Such information suggested—or, at least, so the jury could have found—that Gloria, rather than the defendant, was responsible for the murder and thus had a compelling motive to accuse him of the crime. Since the case against the defendant admittedly depended on the testimony of Gloria, there is heightened significance in the fact, likewise not revealed, that Gloria had actually been confronted with this information, as well as by Mrs. Generazio herself, in the district attorney's office immediately before she recanted (for the second time) her story against the defendant.

The concept of fairness, of due process, imposes upon the prosecution a duty to apprise the defense of evidence favorable to the accused, particularly when such evidence contradicts the testimony given by the People's witnesses in open court. (See *Brady* v. *Maryland*, 373 U.S. 83, 87; *Napue* v. *Illinois*, 360 U.S. 264; *Alcorta* v. *Texas*, 355 U.S. 28; *Mooney* v. *Holohan*, 229 U.S. 103; *Levin* v. *Katzenbach*, F.2d [decided May 19, 1966]; *Barbee* v. *Warden*, 333 F.2d 842; *People* v. *Robertson*, 12 N.Y. 2d 355; *People* v. *Zimmerman*, 10 N.Y. 2d 430; *People* v. *Savvides*, 1 N.Y. 2d 554.) This duty persists even though the defense might, by dint of a little more effort, have independently uncovered the evidence in question and even though the district attorney regards it as lacking in probative force or worthless. The prosecution is not privileged "to decide for the court

what is admissible or for the defense what is useful." (*Griffin* v. *United States,* 183 F.2d 990, 993.)

The argument that disclosure would not have changed the verdict "overlooks the variant functions to be performed by jury and reviewing tribunal." (*People* v. *Savvides,* 1 N.Y. 2d 554, 557, *supra.*) It is for jurors, not judges of an appellate court such as ours, to decide the issue of credibility, and we should be particularly observant of this principle in the case before us, where disclosure might well have impeached the one witness without whom there would admittedly have been no prosecution. In this view, it "matters little" that the district attorney's silence was not the result of guile or a desire to prejudice. (*People* v. *Savvides,* 1 N.Y. 2d 554, 557, *supra.*) "The principle of *Mooney* v. *Holohan* [229 U.S. 103, *supra*]," as the Supreme Court has pointedly observed (*Brady* v. *Maryland,* 373 U.S. 83, 87, *supra*), "is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused."

I would reverse and order a new trial.

• • • • • • • • • • •

Judgment affirmed. Opinion by Keating, J. All concur except Fuld, J., who dissents in an opinion.

Remittitur of New York Court of Appeals, July 7, 1966, as amended pursuant to order dated September 22, 1966

1. No. 511. 65

THE PEOPLE &c., *Respondent,*

vs.

MARK FEIN, *Appellant.*

BE IT REMEMBERED, That on the 17th day of November in the year of our Lord one thousand nine hundred and sixty-five, Mark Fein, the appellant in this cause, came here unto the Court of Appeals, by Phillips, Nizer, Benjamin, Krim & Ballon, his attorneys, and filed in the said Court a Notice of

Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And The People &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Louis Nizer, of counsel for the appellant, and by Mr. Eric A. Seiff, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, and thereafter a motion to amend the remittitur having been granted this remittitur is hereby amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed upon the following question under the Constitution of the United States, in addition to the other constitutional questions expressly passed upon in the opinion, viz.: Appellant contended that the order of the Supreme Court denying his pretrial motion for discovery and inspection of the bullets found in decedent's body deprived him of a fair trial. The Court of Appeals held that the appellant's constitutional rights were not violated.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State

of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, by the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals of the State of New York

Court of Appeals, Clerk's Office,
Albany, July 7, 1966.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk.

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

Witness,

THE HON. CHARLES S. DESMOND,
Chief Judge, *Presiding.*
RAYMOND J. CANNON,
Clerk.

REMITTITUR July 7, 1966

Opinion of Appellate Division, October 19, 1965

SUPREME COURT, APPELLATE DIVISION

First Department, September 1965

CHARLES D. BREITEL, J. P.
BENJAMIN J. RABIN,
SAMUEL W. EAGER,
ARON STEUER,
G. ROBERT WITMER, JJ.

THE PEOPLE of the State of New York, *Respondent*

vs. 9251

MARK FEIN, *Defendant-Appellant.*

Appeal from judgment of conviction of the Supreme Court, New York County (Culkin, J.), rendered May 26, 1965, upon a verdict convicting defendant of the crime of Murder in the Second Degree.

Louis Nizer of counsel (Robert Arum, Paul Martinson, Harold Klapper and George Berger with him on the brief; Phillips, Nizer, Benjamin, Krim & Ballon, attorneys) for appellant.

Eric A. Seiff of counsel (H. Richard Uviller with him on the brief; Frank S. Hogan, District Attorney) for respondent.

STEUER, J.:

In the early morning of November 8, 1963, Fred Petraca, a stationery engineer who operated the Spuyten Duyvil Drawbridge of the New York Central Railroad noticed a body floating in the Harlem River. The body was later identified as the remains of Rubin Markowitz, a part-time grocery clerk whose main occupation had been the booking of bets on sporting events. Investigation revealed that the deceased was last seen by his family on the morning of October 10, 1963, and the last known contact with him

was a telephone call to one of his customers at 4 o'clock that afternoon.

Further investigation developed that the deceased did a large part of his bookmaking business by telephone. For this purpose he employed an answering service. The procedure was for the customer to call the service and leave a telephone number at which he could be contacted. Markowitz called the service at half hour intervals, received the numbers and made the calls. In these arrangements the customers were given fictititious names. One of these names was "Shore" and the telephone number was that of an apartment at 125 East 73rd Street. The tenant of this apartment was a Mrs. Carmela Lazarus. She was a woman with an extraordinary number of aliases, who at the time was known as Gloria Kendal. It was through her that the prosecution learned of the defendant. And it was through her and by virtue of the information given by her that the defendant was charged with homicide and convicted by a verdict of the jury of Murder in the Second Degree.*

The defendant challenges the validity of the verdict and judgment of conviction, advancing some 17 specifications of error. We have examined all of these but find that only six merit discussion. These six can be conveniently treated under three headings—whether the evidence was sufficient to convict beyond a reasonable doubt; whether the district attorney suppressed exculpatory evidence; and whether the prosecution countenanced false testimony, knowing it to be false, and failed to correct it.

In bare outline, the case of the People was that the defendant, on October 10, at about 5 o'clock in the evening telephoned Gloria Kendal and urgently requested her to

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* Following conviction a motion was made for a new trial on newly discovered evidence. The motion was denied. The notice of appeal embraces that determination, but no error in that decision was urged on appeal. Nevertheless, we have given attention to the testimony elicited, where appropriate to the points raised.

come at once to an apartment located at 406 East 63rd Street. Upon her compliance he told her he had killed Markowitz and exhibited his body, which was resting in a trunk. At defendant's suggestion she procured the services of two friends, and the three of them took the trunk in a station wagon to the end of Dyckman Street at the Harlem River and dropped the trunk into the river.

There is no contradiction of the testimony giving this sequence of events, but defendant challenges it on the grounds of inherent improbability, variance with physical and known facts, and the unreliable character of the testimony used to establish it.

The first argument rests on the character of the defendant. It appears that he is a business man, married and the father of three children. He and his family lived in very comfortable circumstances, and he was possessed of substantial resources. He had no prior criminal record and no history of violence was established. It is claimed that it is highly improbable that one so circumstanced would engage in a homicide where the only suggested motive was to escape payment of a debt of some $7,000.

The reverse of this picture must also be considered. Defendant had long been addicted to betting substantial sums with bookmakers. He also indulged in extensive association with prostitutes. It clearly appears that he not only contributed largely to the support of the Kendal woman, he also maintained the 63rd Street apartment for extra-marital activities. While these activities might have been well within the limits of defendant's financial competence, there was evidence that on occasion he did borrow to meet his expenses for this double life. Money difficulties were therefore not entirely to be ruled out. Nor did the prosecution's case rest on the motive of robbery. This was merely advanced as a possible explanation. The jury might well have found that the defendant, having chosen to inhabit the half world that he did, would be subject to the stresses, and the

methods of relieving them, that are more common to its denizens than to those whose activities conform more strictly to conventional standards.

The defendant advances several grounds for claiming that the physical facts belie the narration of events by the prosecution witnesses. We will consider these separately. The testimony was that, after the trunk containing Markowitz's body was loaded on the station wagon, the vehicle was driven to the 73rd Street apartment, where Miss Kendal got out and went to her apartment. The station wagon remained parked in the street. The two persons remaining with it estimate the time that they waited for her as between 30 and 45 minutes. She places it at far less—about 10 minutes. The seriousness of this incident lies in the claim that a bleeding body would be liable to attract attention and that Miss Kendal's assistants would never have taken such a risk. To counteract this, there is no proof that the body was bleeding at the time, and some hours after death it does not appear that it would be. Furthermore, the testimony was that defendant stated that he had placed canvas bags in the trunk to absorb any blood and prevent leakage. Lastly, it was for the jury to say whether people who would undertake an enterprise of this nature would be so worried about such a contingency that they would not possibly have waited for this period of time.

Next it is claimed that it was a physical impossibility for these three to have lifted the trunk out of the station wagon and to have dropped it over the wall which borders Dyckman Street. Markowitz in life weighed about 185 pounds. There is no proof of the weight of the trunk, but for the purposes of this argument we will assume that the claim that it weighed 50 pounds is sufficiently accurate, thus making the total weight about 235 pounds. The wall in question is about four feet high. The proof of the lifting and carrying is not particularly detailed. The three people involved were: Miss Kendal, five feet seven inches tall and weighing about 135 pounds. She describes herself as a

particularly strong woman. Broudy, the only man taking part, was an inch taller, and weighed 165 pounds. He had been a taxi driver for most of his adult life. Miss Boxer's dimensions do not appear, and the record is not consistent as to how much assistance she lent the other two. In view of the very short distance the trunk would have to be carried (about 7 or 8 feet) and the fact that in the lifting a portion of the weight could be made to be borne by the wall itself by canting the trunk, plus the fact that the jury had ample opportunity to judge the strength of these persons, we believe that it cannot be said that this testimony represented a physical impossibility.

The defendant also contends that if the trunk were dumped into the river at 179th Street on October 10, the body could not have been found on November 8 at Spuyten Duyvil, some three miles away. Admittedly, the record is barren of any scientific proof as to whether or not these facts are physically inconsistent. The point was never raised until after the trial.* From the testimony in the case, it did happen, and there is nothing to show in this highly controversial area that it could not have happened.

Finally on this phase of the argument the defendant points to the absence of any evidence of blood on the furniture or walls of the 63rd Street apartment. From the medical testimony it is fairly conclusive that the deceased must have shed a considerable quantity of blood. None of the three witnesses who were in the apartment on the evening of October 10 saw any blood on the furniture, and an examination of the furniture disclosed only one minute speck on a chair. This speck was so small that it could not be typed. As proof that the homicide took place in the apartment,

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* Testimony to this effect was offered on the motion for a new trial. We do not find it to be of such conclusive nature that the interests of justice would require a new trial; and on the question of whether the jury verdict was proper, it cannot, of course, be considered.

it can be disregarded. However, there was evidence that a section of the carpet had been cut away prior to the arrival of the witnesses at the apartment and the resulting strips of material were in a duffle bag. This bag was taken in the station wagon along with the trunk, and similarly disposed of.

We conclude that these facts do not demonstrate that the homicide could not have occurred in the apartment, nor that the narration of facts by the People's witnesses is factually impossible. It is true they raise issues but in no sense do they preclude a finding that no reasonable d[illegible] existed.

We come now to the question of the reliability of the testimony. It is not disputed that Mrs. Lazarus or, as she was generally referred to on the trial, Gloria Kendal, was a completely amoral person who could well merit the defense's description as a depraved character. It has, however, often been recognized that crimes in the category here under review are seldom committed in the presence of reliable and substantial witnesses. Either such crimes must go unpunished or the jury must be allowed to make a determination that on this occasion the testimony reflects what actually happened (see *People* v. *Peller,* 291 N.Y. 438, 446). Such a determination most frequently is largely influenced by the relationship of the testimony from the doubtful source to facts established from more certain origins. Applying that test it will be found that the record reveals as follows:

The defendant on October 10 owed the deceased $7,000. A friend of his, one William Tishman, owed the deceased about $14,000. Defendant arranged with Tishman to pay off both debts on October 10, the money being supplied mostly from the proceeds of a loan on collateral supplied by the defendant. Tishman was to give the defendant his share but was unable to do so, and gave a note. Defendant, in a statement to the police, claimed that he had paid the entire debt to the deceased on the afternoon of October 10.

Miss Kendal saw the Tishman note in defendant's possession when she was at the apartment in the early evening of October 10. So that some contact between the deceased and the defendant on the day in question was abundantly established.

Miss Kendal's testimony was that on her arrival at the 63rd Street apartment the immediate question considered was the disposal of the trunk containing the body. For this purpose she enlisted the aid of David Broudy, a friend of hers, who came to the apartment in response to her call. Broudy came in his brother's automobile but, when he saw the trunk, he told the defendant that he could not get it into his car. The defendant thereupon arranged for the rental of the station wagon. The latter fact is established by the records of the rental company and the unimpeached testimony of its officer and of the employee who turned over the station wagon to the defendant. Miss Kendal testified that she went with the defendant to the rental agency and the rental agent of the 63rd Street apartment building testified that he saw them leave the apartment together at the time she indicated. Furthermore, it appears without doubt that the defendant tried to conceal the fact that he had rented the station wagon by disputing the car rental charge and laying a trap to confuse the employee who turned over the station wagon to him. So the defendant's connection with the disposal of the body as testified to by Miss Kendal was amply established.

It also appeared that defendant misinformed the police in the early stages of the inquiry as to his connection with the apartment on 63rd Street and his relationship with both the deceased and Miss Kendal. The apartment was rented in the name of William Weissman, though the defendant paid the rent in cash, bought the furniture, and later terminated the lease, paying the rental until the apartment was re-rented. The only record connection was that his name appeared as a reference for the fictitious Weissman in the application for a telephone. When questioned by the police

as to this, he stated that the apartment was rented by a prostitute named Margaret Foster, and that he gave the reference as a favor to his friend Tishman, who was the protector of Margaret Foster, and also the "Shore" who appeared in the deceased's books. Actually, Margaret Foster was one of the many aliases of Carmela Lazarus or Gloria Kendal.

Many other items of testimony confirm parts of the testimony given by Miss Kendal, in addition to that given by Broudy and the third member of the disposal group. It leads to the conclusion that on this very material part, the prosecution's contentions were established beyond a reasonable doubt. The only fact which rests on her unsupported testimony is that the defendant did the actual shooting.* Considering all the facts which corroborate her testimony in the related aspects of the case, we would not say that the prosecution rests on testimony so questionable that it cannot remove any reasonable doubt. Beyond that we have no function. It is for jurors not judges of an appellate court to decide the issue of guilt (*Peo.* v. *Mleczko*, 298 N.Y. 153, 163).

Passing now to the claims of concealment of exculpatory testimony by the district attorney, we find that four such instances are claimed.

The first of these concerns Sandra Ede. Miss Ede was a prostitute who spent a good deal of time in the Kendal apartment on 73rd Street. Miss Kendal testified that she was in the apartment on October 10 when the defendant called. Miss Kendal had an appointment with a Miss Geraldine Boxer who was to call for her in Miss Boxer's car. Kendal testified that she told Ede she was going to 63rd Street and to tell Miss Boxer when she arrived that she had

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* The defense contends that the fact that Markowitz's body was in the trunk also rests on her unsupported testimony. While no one else testifies to seeing the body, Broudy testified to an admission by the defendant to that effect.

gone there and that Miss Boxer should meet her there. Miss Boxer testified that when she arrived at the Kendal apartment house she called on the intercom and the Ede woman gave her the message.

On the motion for a new trial it was established that the district attorney interviewed Miss Ede and she refused to testify. She stated that if called she would testify that she was not in the apartment at the time and consequently never received the message; that she had never spoken to Miss Boxer on the intercom; and that on the afternoon in question she was in her own apartment to see to the installation of a telephone. Concededly the district attorney gave the defense the name and address of Miss Ede but the claim is that the full extent of her interview was not revealed.

However, it appears that whether or not it was revealed by the district attorney or obtained through interviewing Miss Ede, the defense was well aware of Miss Ede's contentions. It appears that Geraldine Boxer, whose testimony Miss Ede contradicted, was brought to the office to confront Miss Ede. On the cross-examination of Boxer, the following occurred:

> "Q. Did Sandra deny that? A. She said she doesn't remember.
>
> "Q. Did Sandra say that she didn't talk to you on the telephone that day? A. I don't know. As far as I know, when I was there she said she didn't remember; she couldn't remember that date in particular.
>
> "Q. Wasn't some way of fixing the date discussed in the District Attorney's office? A. I don't know what you mean by fixing the date.
>
> "Q. Well wasn't there something said about the installation of a telephone? A. Yes.
>
> "Q. And didn't Sandra fix the date by the installation of a telephone, and did she not say that she did not speak to you that afternoon, because her telephone was being installed in some other place? Did she say that? A. I believe she said her telephone was being installed, but I also believe that the time element was not asserted.

It therefore appears that all the Ede statements were known to the defense. Despite this knowledge the defense did not call her as a witness. The contention of concealment was not proved.*

The second alleged failure to disclose concerns the information of Mrs. Bennett and her mother, Mrs. McNair. These ladies were tenants of an apartment in 406 East 63rd Street. They occupied an apartment in the rear of the building, whereas the "Weissman" apartment was in the front. They were interviewed by the police and told them that on the afternoon of October 10 they heard pistol shots which they believed emanated from the alleyway beneath their windows and in the rear of the house. Concededly the defense also interviewed these ladies before the trial but it is claimed they never revealed this information. As there were several interviews it is difficult to see what else could have been discussed, as these women did not profess to have any other relevant information.

The third alleged failure is in regard to Mrs. Generazio, an associate of Miss Kendal in the practice of prostitution. She also used many names. In an interview with the district attorney she told the prosecution that at 3 o'clock in the afternoon of October 10th the Kendal woman had telephoned her asking her to procure an automobile to transport a large box. Her story varied from time to time from negation of the call to placing it at 9 o'clock that evening, but at the time of the hearing it had crystallized to the early afternoon, preceding a certain television program which she watched. The district attorney never gave the results of these interviews to the defense, nor did he volunteer the name and address of the witness. That the defense was aware of her existence is undeniable—counsel asked about

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* It is also significant that despite the elaborate preparation and presentation on the motion for a new trial, the obvious method of verifying the Ede version, by the telephone company records, was not resorted to.

her on cross-examination, using one of her aliases. A Mr. Whelan, an ex-police officer who was hired as an investigator by the defense, asked one of the detectives for her address. The detective replied that he was not at liberty to disclose it. The defense did not pursue the matter further, and no request was made by counsel of anyone else to the district attorney.

Lastly it is claimed that the prosecution suppressed a ballistics report by the Police Department. Far from being suppressed, the report was subpoenaed and was in the courtroom at all times in common with all other reports made by police officers. When defense counsel wished to examine or use any of these reports, he asked for them and was immediately accommodated. He never asked for this report. The claim is that it should have been called to his attention.

The suppression by the prosecution of evidence favorable to an accused upon request violates due process if the evidence is material to guilt or punishment, irrespective of the good faith of the prosecutor (*Brady* v. *Maryland*, 373 U.S. 83). Although the requirement of a request for the suppressed testimony has not to our knowledge been obviated by any subsequent expression of the Supreme Court, we prefer not to place our decision on the absence of any request in the claimed instances of suppression. We have noted that this requirement has been stated not to be a sine qua non (*U.S.* v. *Wilkins*, 326 F. 2d 135). On the other hand, we cannot believe that it is the law that every statement by a person interviewed by the district attorney must be disclosed to the defense regardless of its materiality or probable veracity merely because the defense, after the event, claims that it might have made use of it. Mr. Justice White, concurring in *Brady, supra*, stated specifically: "I . . . would not cast in constitutional form a broad rule of criminal discovery." (p. 92) Nor do we believe that any such all-embracing rule has been enunciated. It must be apparent that in a many faceted investigation such as the instant prosecution, a great many persons will necessarily be interviewed. Avenues of investigation will prove to be dead end

streets. We have not yet reached the point where we substitute for the adversary system a process whereby the defense is to be kept advised of every step taken by the prosecution. Rather, we think the true test of what must be disclosed is that of simple fairness. The opposing considerations were well expressed by Judge Hastie:

> "It seems likely that many situations will arise in which a prosecutor can fairly keep to himself his knowledge of available testimony which he views as mistaken or false. But there are other circumstances in which a prosecutor must, or certainly should know that even testimony which he honestly disbelieves is of a type or from a source which in all probability would make it very persuasive to a fair minded jury." (*U.S.* v. *Dye*, 221 F. 2d 763, at p. 769)

While a matter of essential fairness cannot be fixed by express rule or be the subject of precise definition, a brief review of what has been considered unfair may make decision more uniform. In *Brady, supra,* the evidence suppressed was one of three confessions made by a co-defendant. In the two supplied he charged the defendant with firing the fatal shot, in the one withheld he admitted he fired it; in *U.S. ex. rel. Almeida* v. *Baldi,* 195 F. 2d 815, the caliber of the fatal bullet, differing from the caliber of the defendant's revolver, was concealed; in *U.S.* v. *Wilkins, supra,* and in *Wilde* v. *Wyoming,* 362 U.S. 607, the testimony of two reputable eyewitnesses to a robbery to the effect that the defendant was not one of those participating was withheld; in the *Dye* case, *supra,* where the intoxication of the defendant was offered to show absence of intent, the arresting officer who had stated he believed the defendant to have been intoxicated was not called; in *U.S.* v. *Ragen,* 86 Fed. Sup. 382, in a prosecution for rape, the report of an examining physician that the complainant had not been violated was suppressed. Examples could be multiplied, but these are believed to be typical. In two of the cases the reputable character of the witnesses was an important factor in determining that the practice was unfair. In the others, it was the controlling nature of the evidence.

Applying these rules to the alleged instances in the case at bar, we find that in the Ede testimony and the ballistics report there was no ground for even a claim of suppression. As regards Bennett and McNair, even if suppression could be found—which we doubt—the evidence was of such a tenuous nature that even the fairest minded prosecutor would not feel called upon to advise the defense. As for the Generazio testimony, this was clearly not from a source that a jury would be expected to credit. And in view of defendant's knowledge of the witness and that she had some connection with the case, the prosecutor was entitled to assume that any further disclosure would be requested. In no case that has come to our attention has the failure to call attention to evidence whose bearing on the issue of guilt been so remote and speculative been considered suppression.

There is also a claim that the district attorney sat by while testimony was given that he knew to be false. It appears that twice during the preparation of the case Miss Kendal told the district attorney that she would not testify that the defendant admitted the killing or that she saw the body in the trunk, and that her previous statements to this effect were untrue. Upon completion of her direct testimony, the district attorney disclosed these incidents to the defense. Both she and the detectives present were cross-examined as to them. As to the first recantation, no question is raised. It appears that the second recantation immediately followed an interview in which the Kendal and Generazio women were brought together. In the interview Miss Kendal became incensed at Mrs. Generazio, berated her and finally refused to remain in the room with her. The latter was excused and left. Miss Kendal then turned her wrath upon the detective, accusing him of seeking witnesses to discredit her and using Gestapo methods. He was excused and then she made her recantation. The question was asked as to who was present at the interview. Miss Kendal said she did not remember. The detective named the assistant district attorney but did not name Mrs. Generazio. Technically speaking, this

testimony was correct, because at the time of the recantation she was not present. But it was not an accurate statement as to those present at the interview.

The principles behind the rules governing the situation where the district attorney sits by and allows false testimony to be given and that where the prosecutor suppresses exculpatory evidence are the same. The principle is still that the defendant is entitled to a fair trial without trickery or overreaching by the prosecution, and the question is whether the district attorney's conduct negated that right (*People* v. *Savvides,* 1 N.Y. 2d 554). Without a showing that the questioned testimony was false to the knowledge of the prosecution, no unfairness is established (*People* v. *Fanning,* 300 N.Y. 593).

The cross-examinations in which the alleged false testimony was given were not directed to the point on which the testimony was inaccurate. As regards the Kendal woman, the efforts of counsel were to show that the words of the recantations amounted to unequivocal admissions that the earlier statements were in fact false. This was followed by an endeavor to obtain an admission that the recantation represented the fact. With the detective the effort was to show that the recantation was not, as Kendal claimed, the consequence of sympathy for the defendant and remorse for the destruction of his family life. In a way counsel proved his point—that the motive given was false—but he also established a reasonable motive, annoyance with the police investigators. The significant point is that who was present at the interview was not emphasized and actually received only cursory attention. The matter of the recantations was only a small part of extended cross-examinations. When it is considered that the district attorney participated in a very large number of interviews, his failure to correct what appeared to be an incidental fact in regard to one of them is not shown to be deliberate nor an effort to overreach the defense. This view is strengthened by the fact that

the whole subject of the recantations was revealed to the defense by the same assistant district attorney and the defense without that revelation was entirely without information of it. And the revelation was made in a highly ethical manner which drew the express approval of defendant's trial counsel.

Opinion of Supreme Court, New York County, May 26, 1965, denying motion for new trial

SUPREME COURT, NEW YORK COUNTY

SPECIAL AND TRIAL TERM, PART XXXVII

THE PEOPLE OF THE STATE OF NEW YORK

against

MARK FEIN, *Defendant.*

Indictment No.
760/64

CULKIN, J.:

The defendant was indicted for the crime of murder in the first degree on February 25, 1965 and after a trial by jury was convicted of murder in the second degree.

The defendant in an effort to obtain a second trial of the indictment made certain motions. The grounds set forth, which are many and varied, can roughly be divided into 4 categories:

1. Suppression of the evidence by the prosecution.
2. Newly discovered evidence.
3. Verdict against the weight of the evidence.
4. Miscellaneous arguments.

These groups will be treated in inverse order.

The defendant's contention that a chair was improperly introduced at the trial because it was previously illegally seized by the police is completely unsupported by the record. While counsel had objected to the introduction of this ex-

hibit at the trial, there was no evidence adduced in support of an earlier conjecture of his that it might have been unlawfully seized. Indeed, after the witnesses for the prosecution testified, defense did not seek a voir dire on the issue of the unlawful means of the seizure. The court found that said chair had been plainly abandoned by the defendant.

Defendant's contention that prejudicial newspaper publicity "influenced the jury" is a totally unwarranted charge. In fact, indications are exactly to the opposite, for at least one juror was exhaustively questioned by a representative for the defendant during the course of this trial motion and the defense announced its contention of speaking to other jurors on this very subject. Without examining the propriety of this (see People v. DeLucia, N.Y. 2d , 258 N.Y.S. 2d 377 [1965]) it is a fact that not one offer has been forthcoming which would tend to connect newspaper and magazine stories with the jury's deliberations. The defendant never sought a change of venue.

Defendant is in error when he contends that it should have been left for the jury to determine whether Mrs. Lazarus (Gloria Kendal) was an accomplice. A requested charge was refused because not one scintilla of evidence was adduced tending "to justify the inference that the offender has counseled or induced or encouraged the crime." (People v. Swersky, 216 N.Y. 471, 476 [1916]). Defendant confuses "inference" with "speculation" when he points to certain inconsistencies in the testimony of witnesses for the prosecution and labels these as the basis for his conclusion that Mrs. Lazarus may have been an accomplice. The only reasonable conclusion that can be drawn from defendant's analysis of the evidence goes to the credibility of the witnesses in question, and was properly passed on by the jury—it being entirely foreign to the issue of accomplice.

Defendant also argues that the verdict is against the weight of the evidence. There is no support for this as-

sertion. The theory of the defendant rests upon the claims of inconsistent and contradictory bits of testimony heard at trial, the implausibility of the crime, and the incredibility of some of the witnesses, all of which were fully explored by his able counsel. Suffice it to say that neither the theory of the People's case nor the nature of the evidence was suspect as a matter of law. In fact, it is fair to observe that both the quality and the quantity of the proof submitted to the jury was unexceptional; it is not unlike that of countless other cases.

The defendant has tendered a variety of items that is labeled as newly discovered evidence. Despite the effort and ingenuity expended, it is clear that much of what is offered is not evidence at all. The remainder has already been passed upon by the jury. In addition, no explanation is offered as to why almost everything that is now adduced could not have been with diligence adduced before or during the trial. This ground alone would be conclusive in most instances.

A significant portion of defendant's offer rests on the affidavit submitted by Dr. Sidney Weinberg. Dr. Weinberg's testimony is offered in refutation of the People's alleged failure to explain the absence of the flow of blood from the deceased, the ability of two witnesses to lift a body-filled trunk over a retaining wall, and the duration during which the deceased would have remained submerged after being deposited in the river. Each of his conclusions rests upon a statement of facts not supported by the record. The proof at trial did not show an absence of blood; on the contrary, a corner of a rug had been cut away and some time had elapsed before the first prosecution witness arrived on the scene. Opportunity was clearly present for the removal of any stains. What the record reflects is a lack of concern —or desire—by both counsel to elaborate on the subject before the jury.

Similarly, the defendant's suggestion that the trunk in question weighed fifty pounds is totally gratuitous. There

is no justification for such a surmise and the mere fact that one was found by the defense in a lower Broadway store after the trial would not bar the prosecution from coming forward with one one-fifth that weight. However, each such offer would be equally impermissible. Moreover, not only were all of the pertinent facts before the jury, but no qualifications have been set forth as to Dr. Weinberg's special expertise in this highly conjectural area. Finally, the estimate that the deceased would have floated to the river surface within two weeks, (the prosecution's case indicated four weeks) is based on the premise that the body was "otherwise free floating"; since this basis is not founded on fact, Dr. Weinberg's conclusion must necessarily fall.

Defendant's recovery of an electric switch box from the bed of the Harlem River some eighty feet from the point where the deceased had been thrown in, has no place in this proceeding. There is no showing that the object recovered was ever in the trunk, either during its transportation to the river wall or, indeed, in the defendant's apartment. The defendant insists such an association can be drawn because of affidavits he offers that conclude it is "consistent" with known scientific principles that this switch box may have been submerged since October, 1963. He is in error; this is not a sufficient basis to have admitted the switch box in evidence during trial. Furthermore, there is no showing why these diving operations could not have taken place before trial. His failure to ascertain the site must be considered the result of his failure to inquire. His late claim, that he would have been given the wrong hour on which to base his diving calculations, is conjectural at best.

The defendant also proffers the names of present and past members of Mrs. Lazarus' family (Messrs. Barton, Schlessinger, Lazarus); the names of two men who rented the apartment adjoining his 63rd Street dwelling (Messrs. Vanderholm, Champion); and Hans Bruno Kahl, as all being worthy of both investigation and jury attention. The offer

in this application is, of course, improper, as even the defendant seems to recognize for the latter three men are not tendered as the basis for a new proceeding—but an investigation, and the former three were all utilized by the defense during its cross-examination of prosecution witnesses at the trial. Moreover, the affidavits proffered on behalf of Messrs. Champion, Vanderholm and Kahl have been thoroughly discredited both by the collapse of supporting statements and an inconsistent and inaccurate recount of chronology. Furthermore, rules of evidence would preclude Mr. Kahl's story, for, with all its other problems, it is merely hearsay.

Defendant also proffers newly discovered evidence of the location of the shots, absence of a witness from Mrs. Lazarus' apartment—contrary to trial testimony, uncovery of a phone call made by Mrs. Lazarus on the day of the shooting, and further ballistics information, all of which he contends mandate a second trial. Since these are all intimately associated to his charge of prosecutorial suppression of evidence, they will be examined together. The defendant contends that he has evidence to show that two weapons were used to kill the deceased. But the entire structure of his arguments rests on evidence that was before the jury. Thus, the jury knew that one bullet was lighter than the three others, and that fragments from that bullet had lodged in the brain of the deceased. When the defendant's present expert concludes that two guns were used, he fails to take into account the evidence that was produced in conjunction with the autopsy and therefore rests his analysis on a distorted basis.

Similarly, when defendant's expert O'Gorman analyzes the testimony of Detective Haase and concludes that an inconsistency is present regarding the number of murder bullets on which lands and grooves are discernible (at one point he clearly indicates just one and at another implies all), that he is offering now what was open for cross-examination. Besides not agreeing with defendant's analysis of the testimony, its proffer is plainly untimely. The matter was before the jury.

When the defendant argues that the prosecutor suppressed a ballistics report prepared by Detectives Haase and Kelly, he is being unfair. Pursuant to his subpoena, those reports, and all others prepared by the police in this case, were in the court's possession during the trial. They were his to utilize as he saw fit; his choice having been made, he is bound by it. Moreover, his charge that the police reports contained material helpful to him is unfounded. There was nothing in Detective Haase's report that was not explored in front of the jury and when Detective O'Brien testified to his microscopic observation of "three minute fragments of mettalic residue," he confirmed the reason why Detective Kelly saw no pieces of bullet in the floor boards with his naked eye. When the defendant also argues that another court committed error in refusing a pre-trial motion for discovery and inspection of the bullets, he is raising an irrelevancy. He was never refused access to the bullets at trial, and he never contended that he lacked sufficient opportunity to examine them properly. I fail to see how the defendant was prejudiced.

The defendant offered the testimony of mother and daughter neighbors of his, Mrs. McNair and Mrs. Bennett, as proof that the shots came from a direction other than the defendant's 63rd Street apartment. Taking their credible testimony in the most favorable light, each testified that some time in late September or early October 1963, they heard four to six loud noises which came through their living room window (an exposure which faced the rear of the building as opposed to the defendant's dwelling which was in front and two floors higher) late in the afternoon. I find no basis for believing that they recognized the sounds as gunshots, partly because Mrs. Bennett long ago denied hearing shots when questioned by the defendant's first attorney of record, Mr. Kassow, and partly because of their lack of expertise. Mrs. Bennett's recollection that she only discussed having seen a large steamer trunk in the lobby of the building during the same period—but not the "shots"

because of the trial assistant's request that she not discuss it with anyone, is completely inconsistent with her demeanor at the hearing. This voluble witness was simply incapable of restricting her desire to talk. Coupling the testimony of these witnesses with the information they gave to Mr. Dermody and Detective Leman (that the shots came from up above and towards the front of the building—and that Mr. Kassow had been so advised), the only reasonable conclusion is that they are completely confused. They misdated their conversation with Detective Leman by several months, failed to remember their description of the trunk from one week to the next, and as noted above inaccurately recounted the nature of the information they passed on to Mr. Kassow. That they may have told the prosecutor an entirely different story than what they presently recollect is so reasonable that it is the only probable explanation. The prosecutor, having been advised by the witnesses that the defendant's attorney had already been informed of matter which would tend to inculpate the defendant, could not be expected to come forward with the pointless task of repeating that information.

The defendant also proffered a Question and Answer from Sandra Ede which plainly states that she gave no instructions to Geri Boxer on October 10, 1963. It should be pointed out that if the prosecution had not consented to her testifying in court, a hearing was not warranted because the only indication that Miss Ede had so advised the District Attorney is the hearsay affidavit of defendant's counsel. Hearsay is clearly not a proper basis for a hearing on a motion for a new trial (People v. Moore, 29 Misc. 574, 579 [1899]; affd. 53 App. Div. 637 [1st Dept. 1900]; affd. 168 N.Y. 593). However, because of the prosecutor's willingness to explore the merits of Miss Ede's questions and answers, she was permitted to testify. (See People v. Winkler, 20 A D 2d 263, 265 [1st Dept. 1964]).

When Miss Ede provided and signed the questions and answers at the office of defendant's counsel she did so while

being treated as an in-patient for mental illness at Jacoby Hospital—although on the advice and with the assistance of her doctor. In court she indicated, although with some ambiguity, that it was her practice not to speak to anyone over the intercom, and it is clearly this general procedure that she refers to in the questions and answers. But it is equally certain that this witness, who was exceptionally anxious not to be a witness—either at the trial or at the hearing—consistently advised all of the representatives of the prosecution repeatedly she could not recollect "one way or the other" the events of October 10, 1963, or any other day during that period, with repect to her participation in a conversation over the intercom with Geri Boxer. Faced with a witness of now proven instability whom he had every reason to believe was withholding information helpful to his case, the prosecutor acted appropriately when he advised the defense of her name and address. He was under no obligation to volunteer her entire story and defendant's prayer for that proposition is rejected as unprecedented. It is also considered significant that the defendant was not only aware of Miss Ede, but interrogated Miss Boxer at the trial as to whether Miss Ede did not have a different recollection than Miss Boxer's. Miss Ede herself supports Miss Boxer's answer which was "she said she didn't remember." It is further certain that the statements by defendant's attorney concerning the inaccessibility of Miss Ede at the time her name was tendered by Mr. Dermody at trial are inaccurate. She was available as a witness past the time the defense rested, and the conclusion that the defense consciously rejected the idea of speaking with her is irresistible and is supported by their refusal to obtain an affidavit from Mr. Kleinman on this subject, in spite of this court's express request. Similarly, it is plain that the defendant charges that the prosecution harrassed Miss Ede until she was driven to a mental institution is without one scintilla of proof. Miss Ede denied ever making such a charge.

The defendant proffers Dagmar Finch Generazio as basis for a new trial. Her story is that Mrs. Lazarus telephoned

to borrow a car to move a box; she fixes the time as between 3 and 4 P.M. on October 10, 1963. Having seen and heard this witness, I reject her testimony as totally unworthy of belief. While under oath at the hearing, she strained with tireless effort to avoid telling the truth, whether the examination covered her recorded criminal past, the date of her marriage, the frequency which the police telephoned her, or the reaction of Gail Weiner Tracy, a witness called by the prosecution after she submitted a sworn question and answer on behalf of the defendant, upon a certain confrontation. The foregoing are all measurable standards, but of no greater import than the impression this witness created when set against less tangible marks. I find that she never told the prosecution of receiving a call on any afternoon, I further find that insofar as this witness' credibility is concerned, her story that she received any call from Mrs. Lazarus on the day, or month, of the killing does not warrant belief. I find that she never advised the prosecution of identifying a picture of the deceased, and when coupled with her equivocal testimony on the subject I find that she was never able to so identify it.

Sargent Russell Generazio, the estranged husband of Dagmar, testified to certain conversations had with representatives of the prosecution which corroborated his wife's story in most of the material aspects. The witness, who frankly admitted a consuming interest in winning anew his wife's affections, continuously expressed by word and deed his desire to ingratiate himself in her favor during the several days the two were in court. Viewed most charitably, his testimony does not realize the level of probity required.

A more troublesome issue arises upon Detective Leman's and Assistant District Attorney Dermody's candid admissions that Mrs. Generazio told them of receiving a call sometime in late September or early October, 1963, near or after 7 P.M. Since this court finds Mrs. Generazio unworthy of belief, it is understandable that the prosecution did.

Faced with a story of doubtful relevance and a witness who was sufficiently unmindful of the truth that in her desire to become a participant in the trial, that she altered the facts as she believed would be helpful to the prosecution, Mr. Dermody called in the only person who could bear light on the issue. She, Mrs. Tracy, flatly denied the receipt of any such call at any time. Coupling this with Mr. Dermody's accurate knowledge that the defense was aware of both Mrs. Generazio and the defense was aware of both Mrs. Generazio and the story she related, as corroborated by the reference to her by the defense during cross-examination, and Mr. Whelan at the hearing, no improper conduct can be established. In sum, I hold that a new trial is not required by the People's failure to turn over the name of this particular witness to the defense. The defense did not show sufficient diligence in seeking the whereabouts of this witness; her story was not helpful to the defense; and in any event, this witness is so unworthy of belief that further proceedings before a jury are not in order.

In connection with this phase, the defendant contends that the prosecutor was misleading when, at the trial, he objected to a defense question put to Mrs. Lazarus concerning phone calls she made and based his objection on the ground that only one call was made. This comment is taken out of context, for it is clear that the objection was founded only on the basis of improper foundation. Defendant's attorney was assuming a fact in his question that had not been received in evidence, or an inquiry made.

The argument is advanced that failure to disclose Gloria's confrontation by Dagmar was in fact depriving the defendant of a fair trial; that such information would have been invaluable on cross-examination.

As to any further attack on Gloria's credibility, suffice it to say that her character and reputation never were an issue. The defense interrogated her as to every misdeed, and every alleged act of deviation from moral principles. The

People made no effort by way of mitigation—an orphan, a product of Westfield State Farm, committed at an extremely tender age, a product of State rehabilitation—but in fact characterized her in summation as an "old whore."

If anyone was misled in this case it was the police, the District Attorney and Mr. Blinder, counsel for the defendant. In his sworn testimony before the jury, he stated that just a few hours before a scheduled meeting at his office with police officials concerning an official investigation concerning the defendant, he was introduced to one Gloria Kendall. He stated he did not know she and Margaret Foster were one and the same person, Margaret Foster being the person whom the police were seeking in relation to the 63rd Street apartment.

The final witness to testify was Gail Weiner Trady. Her story does not withstand analysis. Her testimony is that although she insisted without variation for months on end that no call had come to her apartment despite the most persistent efforts of the prosecutor, a two hour conference with the defendant's attorney brought forth the vivid recollection and admission of the hour and date of such a call. Subsequently on the very day she allegedly offered this assistance to the defendant, she called the District Attorney's office and advised that the defense had tried to buy her off since her observations were harmful to their cause. Thereafter she left her home for some days in an effort to avoid process. But without detailing the unwholesome taste Mrs. Tracy's narration leaves concerning all of the circumstances immediately preceding her appearance in court, I find that on the basis of her entire testimony she is not worthy of belief. Indeed, one glaring and unexplained contradiction is her statement in the question and answer that she fixed the time of the call as shortly after 3 P.M. because she had just taken her Dilantin and Phelantin pills, and her statement at the hearing that she took these pills only at 9 A.M. and 9 P.M. At 3 P.M. she used the Dilantin pill alone—her unvarying practice for thirteen years. If she had just taken

the two pills she claims in the question and answer, the hour was obviously no where near 3 P.M. In any event, the fact that she could pinpoint the date and hour of a phone call 18 months ago with such accuracy, but remains unable to fix the day of a meeting with an attorney for the defendant the very week of the hearing indicates the want of credibility attaching to her.

The motion is therefore in all respects DENIED.

Dated, May 26th, 1965.

/s/ GERALD P. CULKIN.
J.S.C.
GERALD P. CULKIN

APPENDIX B

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Former Section 749-aa of the New York Judiciary Law*

§ 749-aa. Special jurors in certain counties

1. List of special jurors. The county clerk of each county of the state having a population of one million or more inhabitants, according to the last preceding federal census, shall select from the persons qualified to serve as trial jurors in such county such number of special jurors as the justices of the appellate division of the supreme court, or a majority of them of the department in which such county is situated shall, from time to time direct. The names of the persons so selected liable to serve as special jurors shall be alphabetically arranged, with their places of business and the residence of each. Such county clerk, from time to time, may cancel such selection and strike the names of such special jurors from such list and select other special jurors in their places. Persons who are selected as aforesaid by such clerk to act as special jurors shall be exempt from all other jury duty from and after the date of their selection, and they shall remain so exempt so long as they continue to be such special jurors.

2. Persons ineligible. No person shall be selected as such special juror who is by law disqualified or who claims and is allowed exemption from service as a trial juror, or who has been convicted of a criminal offense, or found guilty of fraud or other misconduct by the judgment of any civil court or who possesses such conscientious opinions with regard to the death penalty as would preclude his

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* This is the text of Section 749-aa (being also known as Article 18-B of the New York Judiciary Law) as it was in effect at the time of appellant's indictment and trial. Subsequently, Section 749-aa was repealed in its entirety by New York Laws 1965, c. 778, § 3, effective September 1, 1965.

finding a defendant guilty if the crime charged be punishable with death, or who doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression, or whose opinion as to circumstantial evidence is such as would prevent his finding a verdict of guilty upon such evidence, or who avows such a prejudice against any law of the state as would preclude his finding a defendant guilty of a violation of such law, or who avows such a prejudice against any particular defense to a criminal charge as would prevent his giving a fair and impartial trial upon the merits of such defense, or who avows that he cannot in all cases give to a defendant who fails to testify as a witness in his own behalf the full benefit of the statutory provision that such defendant's neglect or refusal to testify as a witness in his own behalf shall not create any presumption against him.

3. Examination as to fitness; subpoena; punishment for disobedience. No person shall be selected as a special juror until he shall have been examined personally by the county clerk, his deputy, secretary, or any other employee of the county clerk's office duly authorized by the county clerk and approved by the presiding justice of the appellate division, as to his qualification and fitness to serve as a special juror. Such county clerk may issue a subpoena requiring any person within such county to attend before him, his deputy, secretary or any other employee of the county clerk's office duly authorized by the county clerk and approved by the presiding justice of the appellate division, at a time specified for the purpose of testifying concerning the qualification or fitness of himself or any other person to serve as a special juror, and the propriety of the selection of such special juror. A person so subpoenaed must attend and testify accordingly. In case of his failure to attend and testify as required by such subpoena, or a refusal to be sworn, or to answer any legal or

pertinent question, he shall be punished therefor by any justice of the supreme court as a contempt of court. A subpoena issued under this section shall be regulated by the civil practice law and rules, except that no fees are required to be paid to any person so subpoenaed. The record of the jurors selected as such special jurors, shall contain the age of each special juror so selected, his business or vocation, if any, the length of his residence in the state and county and, if naturalized, the date of his naturalization. Such record shall be a public record and shall be open to inspection.

4. Application for special jury. Whenever an issue of fact has arisen in any civil or criminal action triable in a county embraced within the provisions of this section, the district attorney, or the defendant, if in a criminal action, or either party in a civil action may apply for a special jury to try such issue. Such application may be made at any term of the supreme court appointed to be held within the county where such issue is triable, or at any term of any other court of record in which court such issue is to be tried. It must be made upon the indictment, the plea thereto and an affidavit in a criminal action or the pleadings and affidavit in a civil action upon two days' notice to the adverse party or his attorney. Where, upon such application, it appears to the court that by reason of the importance or intricacy of the case, a special jury is required, or that the subject-matter of the indictment or the issue to be tried has been so widely commented upon that the court is satisfied that an ordinary jury cannot without delay and difficulty be obtained to try such issue, or that for any other reason the due, efficient and impartial administration of justice in the particular case would be advanced by the trial of such an issue by a special jury, the court to which the motion is made may make an order directing that such trial be had by a special jury, and such trial shall be had accordingly. The order must specify the time when the drawing of such special jury shall take place and

the number of special jurors to be then drawn, the term of the court and particular day in the term when such special jury must attend. The day so specified for the attendance of the special jury must, except in the case of an order for additional special jurors drawn under subsection six of this section, be at least five days in addition to any Sunday, holiday or half-holiday, after the day specified for the drawing of the special jury.

5. Drawing; notification of jurors. At the time specified in the order the special jury shall be drawn at the office of the county clerk as provided in section six hundred and two of this chapter. A minute of the drawing must be kept by the county clerk, or his deputy, which must be entitled in the action in which the jury is to serve specifying the term of court and the particular day in the term when the special jurors so drawn must attend; and there must be entered thereon the name of each juror drawn. Such minute must be signed by the judge or justice and by the county clerk, or his deputy, present at the drawing and such minute so signed must be filed in the office of such county clerk. Such county clerk must notify each juror therein named in the manner provided for trial jurors, except that provisions as to intervals of time with regard to the notification of trial jurors shall not apply. Before the day specified for the attendance of the special jurors the county clerk must file with the clerk of the trial court, part or term at which the juror is required to attend, a certified copy of the minute with a return indorsed thereon or annexed thereto specifying the manner in which each juror was notified and the time and place of the service of such notice. Such return shall be presumptive evidence of the fact of such service. An affidavit of the person by whom such service shall have been made, stating the manner, time and place of such service shall accompany such return.

6. Additional jurors; drawing. If the panel of the special jurors thus drawn shall be exhausted before a jury

is completed, or if the trial court shall be of the opinion that additional special jurors will probably be needed to complete the jury, the trial court may, from time to time, direct that such additional special jurors be drawn for the trial as it may deem expedient. The order must specify the number to be drawn, the time of the drawing and the time when such additional jurors shall be required and notified to attend. Such additional drawing shall be made by the same officers authorized to draw the special jurors, either in open court in the presence of the judge or justice presiding at the trial, or at the office of the county clerk as prescribed in such order, and shall be conducted in the same manner as the original drawing and a minute thereof kept and certified as prescribed for the original drawing and the jurors so drawn shall be summoned in the same manner as those originally drawn.

7. Challenges; trial. The parties to such an action shall have the same number of peremptory challenges and the same challenges for cause to be tried in the same manner as upon a trial with an ordinary jury. The rulings of the trial court, however, in admitting or excluding evidence upon the trial of any challenge for actual bias shall not be the subject of exception. Such rulings and the allowance or disallowance of the challenge shall be final. Upon the formation of a special jury as hereinbefore provided the issue must be tried by such jury as prescribed by the code of criminal procedure or the civil practice act with respect to a jury trial in a criminal or civil action with an ordinary jury.

8. Revision of list. In each county of the state to which this section applies, the names selected and composing the special jury list heretofore compiled, shall be the special jury list for such county subject to such revision thereof by striking therefrom and adding thereto the names of such jurors as from time to time the county clerk shall deem proper.

9. Appellate division to make rules. The justices of the appellate division of the supreme court of the department embracing the county in which such special jury list shall be constituted shall make such rules and regulations not inconsistent with the provisions of his section as shall be necessary to regulate the making of the application for a special jury under the provisions of this section for the drawing and attendance of such jurors and for the proper and efficient enforcement of the provisions of this section.

10. Duties of commissioner of jurors in certain counties. In the event that the office of commissioner of jurors has been established in a county to which the provisions of this section are applicable, all of the powers and duties conferred or imposed upon the county clerk by this section are transferred to and shall hereafter be exercised and performed by the commissioner of jurors of such county.

11. Violations of section or rules, penalty. Any violation of this section, or of such rules and regulations prescribed by the appellate division of the supreme court shall be deemed a contempt of court under section seven hundred fifty of the judiciary law and such rules and regulations may be enforced as if a violation thereof were such a contempt as provided by section seven hundred fifty-one of the judiciary law.

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously as-

certained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 813-d3 of the New York Code of Criminal Procedure

[Relating to Motions for Suppression of Evidence Alleged to Have Been Obtained as a Result of Unlawful Search and Seizure]

3. When the motion is made before trial, the trial shall not be commenced until the motion has been determined, except that, in the case of misdemeanors and offenses, the court having summary jurisdiction over such crimes and offenses may, by general rule of court, provide that the hearing and determination of such motions may be referred to the trial court for determination during the course of the trial upon the consent of the district attorney, or if no contrary general rule of court has been promulgated, the court before which the motion is made shall have discretion either to entertain the motion, or to refer it to the trial court for determination during the course of the trial if the district attorney consents thereto. When the motion is made during trial, the court shall, in the absence of the jury, if there be one, hear evidence in the same manner as if the motion had been made prior to trial, and shall decide all issues of fact and law.

APPENDIX C

MATERIALS RELATING TO BLUE RIBBON JURIES

Excerpts from 1952 Report and Study of the Judicial Council of the State of New York*

From Report (pp. 58-59):

The Judicial Council has sought to improve the general jury system to such an extent that extraordinary juries would no longer be necessary. The Council believes that every petit jury should be of uniformly high calibre and capable of giving a fair trial in any type of case. In large part the Council's recommendations for the improvement of general juries have been adopted; thus women are now eligible to serve, exemptions have been limited and general jurors must meet the standards formerly required only of special jurors. So, too, the Council's recommendations for the abolition of extraordinary juries have been adopted by eliminating foreign and struck juries (see Third New York Judicial Council Report 34, 121-128 (1937); Fourth *id.* 20 (1938)). However, despite the improvement of the general jury system, special juries are still retained in four counties.

In 1937, the Judicial Council first recommended the abolition of special juries in the counties in which they then existed on the grounds that they were unjust and unnecessary (Third New York Judicial Council Report 34, 121-128 (1937)). This recommendation has been renewed periodically (see particularly, Fourth New York Judicial Council Report 46-48 (1938), Eighth *id.* 39-41 (1942)). In 1941 special juries were abolished in Westchester and Nassau Counties upon the recommendation of the officials of those counties (Eighth New York Judicial Council Report 24, 39 (1942)). Consequently special juries are now authorized only in New York, Bronx, Kings and Queens Counties.

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* Footnotes omitted.

During the past few years, two cases were decided by the Supreme Court of the United States which upheld the constitutionality of the special jury. Both were five to four decisions. In view of these cases and the fact that it is more than a decade since the Council has collated and presented facts on this subject, the Council conducted a survey for the purpose of re-evaluating its past recommendations in the light of presently existing facts. The survey is contained in this Report in Supporting Study (A) 153 to 171, *infra*.

The Council reasserts its belief that the basic concept of a special jury is repugnant to the traditional right of a person to be tried by a jury of his peers (Fifth New York Judicial Council Report 42 (1939)). In any event, the lack of necessity for the special jury and the fact that there are no truly objective standards for the selection of special jurors justify the abolition of special juries.

On the basis of the facts brought out in the survey and upon re-consideration the Council renews its recommendation that special or so-called "blue ribbon" juries for counties having a population of one million or more, under the sole provision now left for permitting special juries and applicable only to the counties of New York, Bronx, Kings and Queens, be abolished.

From Study (pp. 157-159):

In its Third Annual Report in 1937, the Judicial Council recommended the abolition of special juries. This recommendation has been consistently renewed since that time.

The Council's approach to the problem is indicated by the following excerpts from the Council's Fourth Annual Report to the Legislature in 1938 (pages 46-47):

> "The Judicial Council has been attempting to improve the general jury system to such a point that extraordinary juries of any kind will no longer be

necessary. To this end, the Council recommended women jurors, limitations on jury exemptions, and the abolition of struck, foreign and special juries, all of which recommendations were put into effect, except the abolition of special juries. . . .

"The Judicial Council believes that every petit jury should be of uniformly high calibre and capable of giving a fair trial in all cases. To attain this goal, the ordinary jury, as now provided, may be in need of improvement. It is, however, unjust and should be unnecessary to select supposedly special juries in specific cases."

Improvement in the quality of jurors on the general panel has long since been accomplished by applying to all jurors the standards which formerly were required only of special jurors, with the result that the general panel now represents a true cross section of the community.

In 1941, provisions of the statute which had permitted the use of special juries in Nassau and Westchester Counties, where, however, such juries had not been utilized, were eliminated.

In 1947 and 1948, the cases of *Fay* v. *New York* and *Moore* v. *New York,* in which the Supreme Court of the United States by five to four decisions upheld the constitutionality of the special jury law as it was then shown to have functioned by the evidence in those two cases, suggested that a re-appraisal of the application of standards under the law on a current basis might have changed the result.

In view of the above developments together with the fact that it is now more than a decade since the facts showing the operation of the special jury system were collected

and presented by the Council, the Council has made this survey and re-evaluation of the subject covering the judicial years 1941 through 1950.

As a result, the Judicial Council renews its recommendation that special or so-called "blue ribbon" juries for counties having a population of one million or more, under the sole provision now left permitting special juries and applicable only to the counties of New York, Bronx, Kings and Queens, be abolished.

Conclusions that follow from the Council's survey are:

A. With respect to the use of the special jury, the special jury provisions apply only to New York, Bronx, Kings and Queens Counties. However, the special jury is used only in New York, Bronx and Kings Counties.

In New York, Bronx and Kings Counties the special jury is used:

1. Almost exclusively in the trial of murder first degree prosecutions;

2. Almost exclusively upon request made by the district attorney.

B. Comparison between the composition of the special jury and general jury panels in the four counties where it may be used shows:

1. The special jury is no longer needed because the general jury system is producing a fair cross section of the community capable of determining any case.

2. There are no objective statutory qualifications by which the selection of special jurors may be differentiated from those selected for the general jury panel.

3. The special jury panel is a less fair cross section of the community than the general jury panel because of greater imbalances as to:

(a) occupation, there being a disproportionate weighting in favor of "business" people as opposed to "working" people;

(b) educational qualifications;

(c) sex, there being a smaller proportion of women to men on the special jury panel than on the general jury panel.

While there are no adequate facts that prove that the special jury is a convicting jury since it cannot be assumed that a banker is more "prejudiced" against a person accused of murder than a plumber, or that males are more prone to convict than females, or that the more educated are so inclined to a greater extent than the less educated, the special jury does not measure up to the theory that a jury should represent a fair cross section of the community.

Even though murder trials are in some respects more "important" than others, there does not seem to be any factual basis for the assumption that they are more difficult of proof or more complex or require more understanding or ability on the part of the jurors than many other types of cases. Nor can it be seriously argued that murder trials in counties of more than one million population are more intricate or difficult of comprehension than in counties of less than one million.

Trying one indicted for murder in Kings County by a special jury, aside from any question of constitutionality, but trying those similarly indicted in nearby Nassau County by a general jury does not readily appeal to reason or sound public policy.

The wisdom of sending men to the electric chair on their conviction by a jury selected under a system which four justices of the Supreme Court of the United States have condemned as unconstitutional on weaker evidence of its

defects than is here presented is questionable. Especially is this true when there is a constitutional system already in existence, the merit of which is publicly testified to by judges in our courts who are in daily contact with it.

From Study (pp. 165-166):

B. Occupation

As the defendants in the *Fay* case attempted to prove, the most significant difference between the special and general panel is occupational.

A comparison shows that those generally assumed to rate higher in the economic structure predominate on the special panel, while the general panel more nearly represents a cross section of the community. Thus, those who may be called business people (executives, insurance men, real estate men, advertising men, manufacturers, bankers, dealers in securities, accountants, auditors, and buyers) constitute a large portion of the special panel: 47% in New York County, 43% in Bronx County, 45% in Kings County and 39% in Queens County, while they make up a much smaller portion of the general panel, 23% in New York County, 24% in Bronx County, 16% in Kings County and 15% in Queens County.

On the other hand, those who may be called working people (electricians, chauffeurs, drivers, personal servants, service and repairmen, labor union representatives, bookkeepers, miscellaneous skilled and unskilled laborers, superintendents of buildings, secretaries and stenographers, and clerks) constitute a larger portion of the general panel than they do of the special panel.

The tables indicate that the special jury lists contain the following percentages of such groups: 7% in New York, 25% in Bronx, 17% in Kings and 18% in Queens, while the general panel contains 17% in New York, 36% in Bronx, 40% in Kings and 45% in Queens in the groups mentioned.

The occupational tables indicate variations in stress from county to county. However, the trend is the same in all counties.

C. Education

The educational level on both panels varies considerably from county to county but in each county the educational level of the special panel is higher than that of the general panel. The difference between the two panels is greatest in Queens County and least in Bronx County.

Thus, the percentage of special jurors who had gone at least part way through college was 60% in New York, 21% in Bronx, 43% in Kings, and 43% in Queens, while of the general list only 41% in New York, 17% in Bronx, 20% in Kings, and 12% in Queens had done so.

Conversely, those on the special jury list who had not gone beyond primary school constituted only 5% in New York, 21% in Bronx, 5% in Kings and 4% in Queens, while on the general list the percentages were 13% in New York, 22% in Bronx, 25% in Kings and 34% in Queens.

Those on the special list who had completed high school made up 25% in New York, 33% in Bronx, 26% in Kings and 27% in Queens. On the other hand, high school graduates constituted 32% in New York, 34% in Bronx, 24% in Kings and 26% in Queens of the general list.

The educational figures indicate that the selecting officials place much greater stress on formal education in Queens County than they do in Bronx County and that New York and Kings Counties fall between the two.

A glance at the occupational table is in order in regard to education. It indicates that certain groups usually assumed to have high educational and intelligence levels are rarely selected for the special list. Thus, the number of the educators, teachers, librarians, college students and

social workers on the special list is nineteen in New York, none in Kings and four in Queens. The general panel indicates ninety-six in New York, thirty in Kings and five in Queens. In Bronx County the trend is seven to four the other way.

D. Sex

The percentage of women on both panels varies considerably from county to county, perhaps indicating that in some counties the selecting officials make less effort to obtain women who are willing to serve.

Women on the special panel comprise 2% in New York, 10% in Bronx, less than 1% in Kings, and 11% in Queens. On the general panel women constitute 11% in New York, 22% in Bronx, 6% in Kings and 7% in Queens.

Excerpt from April 26, 1965 Report of the Committee on Criminal Courts, Association of the Bar of the City of New York

Present law provides that the county clerk of each county having a population of a million or more (i.e., New York, Kings, Queens and Bronx Counties) is required to select from among the persons qualified to serve as trial jurors in that county a certain number of special jurors. The selection is made after each prospective special juror has been personally examined as to his qualifications by the county clerk or his designated subordinate. Certain standards must be met, but it is the county clerk or his subordinate who determines whether the person examined should become a special juror. If the juror is rejected, it is often impossible to determine whether the rejection was based upon his failure to meet the statutory qualifications or upon his failure to meet some subjective criteria which may have been applied by the examiner.

* * * *

The Committee favors the abolition of the special jury for two reasons. First, it is of doubtful constitutionality.

The United States Supreme Court upheld the special jury against constitutional attack by the barest of majorities in *Fay* v. *New York*, 332 U.S. 261 (1947) and *Moore* v. *New York*, 333 U.S. 565 (1948). In those cases, however, the majority held no more than that the evidence presented as to the allegedly unfair operation of the special jury system did not warrant a finding that either the right to due process or the right to equal protection of the laws had been violated. Sufficient evidence may now be available. See, for example, the Recommendation and Survey Relating to the Abolition of Special Juries, published in the 18th Annual Report and Studies of the Judicial Council of the State of New York (1952). The special jury may not survive another such attack upon its constitutionality.

Second, if the superior quality of the special jury was ever necessary to the proper administration of criminal justice, it is no longer so, since—as would be attested to by most New York prosecutors—the quality of the regular jury panel has considerably improved by virtue of the raising of the standards by which it is selected, as well as through the general educational increase in the population as a whole.

In sum, since the special jury is an unnecessary institution of dubious constitutionality, it should be abolished. The abolition should extend to all cases, not merely those where the death penalty may be imposed.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 793

MARK FEIN,

Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

October Term, 1966

No. 793

MARK FEIN,

Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, the appellee herewith moves to dismiss the appeal in the above-entitled action on the ground that it is not within the jurisdiction of this Court because not taken in conformity to 28 U. S. C. Section 1257(2) and on the ground that it does not present a substantial federal question; or, in the alternative, to affirm the judgment below as fully in accord with all controlling constitutional principles.

Jurisdiction

The appellant, in part, seeks to invoke this Courts' jurisdiction, under 28 U. S. C. Section 1257(2), by contending that former Section 749-aa of the Judiciary Law of the

State of New York was unconstitutional as applied to appellant. However, throughout the proceedings below, appellant contended only that the procedure adopted, i.e., the trial before a panel of special jurors, violated his constitutional rights. [See appellant's brief to the New York Court of Appeals, pp. 81-83; appellant's brief to the New York Supreme Court, Appellate Division—First Department, pp. 183-186; appellant's reply brief to the New York Supreme Court, Appellate Division—First Department, pp. 36-37.]

Never in any court in the State of New York has appellant contended that former Section 749-aa of the Judiciary Law of the State of New York on its face, as construed, or as applied, was invalid under the United States Constitution. Indeed, appellant never mentioned that statute in the appellate courts of New York. That the validity of the provision in question was not challenged in the state court is also evident from the opinion of the New York Court of Appeals which states: "Defendant's contention that the use of a special jury deprived him of his constitutional rights to a fair trial has been considered before and found to be without merit (cits. om.)" (Appendix to Appellant's Jurisdictional Statement, p. 2a).

It is fundamental that where the validity of a statute is not "drawn in question" by an explicit and timely insistence in the state courts that the statute, as applied, is repugnant to the United States Constitution, this Court has no jurisdiction under 28 U. S. C. Section 1257(2) and the appeal must be dismissed. *Ungar* v. *Sarafite,* 376 U. S. 575, 582-3 (1964); *Slagle* v. *Ohio,* 366 U. S. 259 (1961); *Rohr Aircraft Corp.* v. *San Diego County,* 362 U. S. 628

(1960); *Anonymous* v. *Baker*, 360 U. S. 287 (1959); *Hanson* v. *Dinckla*, 357 U. S. 235 (1958); *Wilson* v. *Cook*, 327 U. S. 474 (1946); *Charleston Federal Savings of Loan Assn.* v. *Alderson*, 324 U. S. 182 (1945); *Memphis National Gas Co.* v. *Beeler*, 315 U. S. 649 (1942).

Statement

The appellant was convicted, after trial, in the Supreme Court of the State of New York, County of New York, of the crime of MURDER IN THE SECOND DEGREE (Penal Law of New York, §1046). He was sentenced to State Prison for a minimum term of thirty years and a maximum of life (3885).* Following conviction, but before sentence, the appellant moved for a new trial (24B-26B). Following a hearing that lasted some weeks on certain selected issues, appellant's motion was denied by the trial court in a complete, detailed, and persuasive opinion (3894-3913).

The Appellate Division of the Supreme Court, First Department, unanimously affirmed both the judgment of conviction and the denial of appellant's motion for a new trial [24 App. Div. 2d 32, 263 N. Y. S. 2d 629 (1965)]. That decision was in turn affirmed by the Court of Appeals [per KEATING, J.; FULD, J., dissenting, 18 N. Y. 2d 162, 272 N. Y. S. 2d 629 (1966)]. The opinion of the Appellate Division appears in the certified record (3953-3969). The opinions of the Court of Appeals are appendixed to petitioner's Jurisdictional Statement (1a-14a).

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* Unless otherwise noted, all references are to the page numbers of the Record on Appeal. Where two numbers appear on a page of the Record, the number at the bottom of the page will be used as the reference.

The trial record irresistibly established the appellant's guilt of shooting his bookmaker, one Rubin Markowitz, four times in the head and chest, and while the jury's verdict was challenged by Point XV of appellant's seventeen point brief to the Appellate Division, there was no attack against it in the Court of Appeals. The murder, which occurred in an apartment rented by the appellant under the pseudonym "Weissman", was the bizarre culmination of appellant's sordid double life (503-10, 1445, 1112-16, 1123, 1283, 1137-9). Though surrounded by the indicia of social standing in the community, the proof at trial revealed that the appellant spent considerable time and money in the nether world of assignations, call girls, private parties of perversion, and heavy gambling (*ibid.*). Already deeply in debt, the appellant lost seven thousand dollars betting against the Los Angeles Dodgers in the 1963 World Series (563, 584-7, 1113-14). The appellant thereupon arranged with a friend that he, the appellant, would pay the bookmaker not only the money he lost, but also some $16,690 owed to Markowitz by that friend and another (561-2, 564-6, 571, 577-84). The killing permitted appellant to pocket the cash furnished by his fellow gamblers while writing off his own debt, a coup of almost $24,000 (565-6, 574-5, 577-8, 582, 667-9). Once the deed was completed, however, his composure failed and he sought assistance.

He telephoned his companion and procuress, Carmela Lazarus, a woman of many aliases, whom appellant knew as Gloria Foster (1119, 1133). Mrs. Lazarus responded, with some reluctance, to the appellant's distress signal (1133). Before quitting her apartment, she left a hasty message with another prostitute who remained behind, one Sandra

Ede, and taxied the ten blocks to the appellant's secret lodging (1134).

There the appellant told her that he had shot his bookmaker and pleaded for assistance in disposing of the body, which he had already stuffed into a steamer trunk (1137-9). Responding, Mrs. Lazarus telephoned one David Broudy, who drove over from an adjoining county (881, 961).

Meanwhile, Geraldine Boxer, whose custom it was to meet daily with Mrs. Lazarus for a light supper before each attended their respective evening classes, drove to Mrs. Lazarus' apartment (700-1, 705, 905, 1130, 1132). Miss Boxer was directed by Miss Ede, over the intercom, to the "Weissman" apartment—the murder scene (706, 708-10).

Eventually, Miss Boxer and Mr. Broudy entered the "Weissman" apartment, the latter with the cheap pair of gloves he had been directed to purchase (710-15, 749-50, 882-4, 892, 972-3, 1141). Conceding the presence of the body in the trunk, the appellant responded to Mr. Broudy's questioning by claiming that while he was paying his bookmaker, "somebody burst in * * * shot this man and scooped up the money and left" (893). Assuaging Mr. Broudy's fears about blood leaking from the trunk, the appellant advised that he had lined the bottom with "some canvas bags" (894-5).

The defendant then arranged for the rental of a station-wagon from a nearby concern, and with Mrs. Lazarus he went to pick it up (723-7, 821-6, 829-33, 897-9, 1014-15). By coincidence it was the same vehicle the appellant had rented the previous day—arguably for the purpose of transport-

ing the then newly purchased steamer trunk to the "Weissman" apartment (838-9, 894-5, 1017-18, 1048-9, 1058-9, 1066, 1548-9).

The appellant gave Mr. Broudy the keys to the vehicle and departed, at the insistence of his three helpers, for an evening's dinner engagement (731-2, 904, 1939). The two women accompanied Broudy as he drove about Manhattan looking for a place to dispose of their cargo (737, 908). After a drive of some duration, they stopped by an isolated bank of the Harlem River, and consigned the trunk and its contents to the river (737-9, 801, 908-9, 1155-6).

During the weeks which followed, Mrs. Lazarus and Mr. Broudy responded to appellant's pleas for assistance in attempting to obliterate all evidence that might have associated either him or the crime with the "Weissman" apartment (914-24, 1159-74, 1376). Thus, holes in the floor and wall were concealed with filler and paint, the carpet was first repaired and then destroyed, the furniture and furnishings removed, and the lock changed (*ibid.*). Additionally the appellant told his good friend that "he had gotten rid of the apartment * * * a week or two after the World Series" and in December directed the landlord to terminate the lease (512, 555, 557, 652).

Concurrently with these activities, the appellant had several conferences with the police, two of his own seeking; he was accompanied by counsel (433-5, 1477, 1489, 1492, 1495-6). The appellant's evasions and prevarications to police questioning were foolhardy attempts to mislead both law enforcement officials and, as the judge at the post-trial hearing noted, his lawyer as well (3911, 1495-7, 1500-7, 1511).

Following his conviction, the appellant retained his fourth consecutive attorney, Louis Nizer, Esq., who promptly moved for a new trial, filing affidavits which fill 376 pages of the record, plus exhibits (27B-484B). A hearing was consented to by appellee on the basis of four of the many claims: the failure of the prosecution to advise the defense of the names and stories of Dagmar Finch Generazio, Sandra Ede, Vera McNair and her daughter Yvonne Bennett (486B-493B, 497B-499B, 525B, 2297).

Dagmar Finch Generazio's post-trial story was that Mrs. Lazarus telephoned her before 4:00 p.m. on October 10, 1963, seeking a car to move a heavy box (2547, 2550-1). Since the proof at trial placed the killing after 4:00 p.m., the appellant's argument throughout has been that this is exonerating evidence which the prosecution knew of, suppressed and, indeed, covered by tendering perjurious testimony. Without, at this point, detailing the hundreds of pages of evidence on the subject,* the short answer is that the claim of prosecutorial suppression is absolutely without support, for both appellant's attorney and his investigator testified at the post-trial hearing that they knew Dagmar had been to the District Attorney's Office and knew, while the trial was still in session, that she told of receiving a telephone call from Mrs. Lazarus on October 10, 1963, seeking the loan of an automobile (2914, 2917-19, 2928, 2955, 3003-4, 3018-19).

Sandra Ede's post-trial testimony is confused and contradictory, its substance varying from a denial of being

* For the convenience of the Court, the appellee has lodged with the certified record its brief to the Court of Appeals of the State of New York, which contai s a complete summary of facts.

present in Mrs. Lazarus' apartment when the latter was first called by appellant and a denial of advising Miss Boxer over an apartment intercom of Mrs. Lazarus' whereabouts (3228-30, 3301, 3306), to an assertion that she was "not sure" of what happened on October 10th (3156-7). The latter account, a claimed lack of recollection of the events of October 10th, was the story Miss Ede insisted upon prior to trial (782-3, 3375-8), and repeated before a stenographer (189B-196B) and Miss Boxer (782-3, 786). This insistence of non-involvement, which the prosecutor swore was the only story Miss Ede ever told, was fully disclosed to the defense at the conclusion of the People's case; Miss Ede's name and address were also provided (3375-8, 1746-7).

The post-trial testimony of Mrs. McNair and Mrs. Bennett concerning the source of gunshot sounds also varied markedly from their pre-trial tales (2888-9, 3083, 3126, 3091-2, 3127-8, 2989, 3366-8, 3414, 3370-1, 2388-2393). But whether they believed the shots to have emanated from a direction consistent with the murder site as they advised the prosecutor, or from a source directly opposite as they asserted after trial (in either event, evidence of a most tenuous nature), is less significant than the fact that one of the women, Mrs. Bennett, spoke with appellant's first attorney, Saul Kassow, Esq., about several aspects of the case prior to trial (2981, 2984, 2989). In one of those conversations, to the best of Mr. Kassow's recollection, Mrs. Bennett denied hearing any shots at all (2989).

No Substantial Federal Question is Presented.

(1) The selection of special jurors was not in contravention of appellant's constitutional rights.

The appellant contends that the use of a special jury contravened his constitutional rights. More specifically, he urges that former Section 749-aa of the Judiciary Law of New York is unconstitutional, but as pointed out above (*supra* at p. 2) the question of the validity of that statute has not been preserved for consideration by this Court on appeal. Incorporated in his major contention, however, are the sweeping assertions that the use of special jurors, as applied to him, was so prejudicial as to deprive him of his fundamental rights. Meaningful support for this assertion is lacking. Indeed, the most telling refutation of his thesis comes from the affidavit of his own trial counsel opposing the motion for the special panel:

> "The qualifications of a member of a special panel and that of a member of a regular panel are the same other than the former must entertain a belief in capital punishment while the latter need not.
>
> * * *
>
> "Since ordinary jurors and special panel jurors have the same qualifications, there is no reason for any delay. One question to the assembled panel of ordinary jurors would dispose of any who had conscientious scruples against capital punishment" (174A).

From its inception, the special jury system was subject to frequent attack; but its abolition ultimately occurred in the Legislature [Judiciary Law of New York, former §749-aa, repealed L. 1965, ch. 778, eff. Sept. 1, 1965] not in the courts, where its validity was unfailingly upheld. *Hall* v.

Johnson, 186 U. S. 480 (1901); *Fay* v. *New York,* 332 U. S. 261 (1947); *Moore* v. *New York,* 333 U. S. 565 (1948); *Vanderwyde* v. *Denno,* 113 F. Supp. 918 (S. D. N. Y. 1953), aff'd 210 F. 2d 105 (2d Cir. 1954), *cert. denied* 347 U. S. 949 (1954); *People* v. *Agron,* 10 N. Y. 2d 130, 141 (1961), *cert. denied* 368 U. S. 922 (1961). The Constitution "requires only that the jury be indiscriminately drawn from among those eligible," untrammeled by "purposeful discriminatory exclusion" [*Hoyt* v. *Florida,* 368 U. S. 57, 59, 68 (1957); *Fay* v. *New York, supra* at 284-285]. And, of course, in the case at bar there is a complete omission of evidence suggesting that any discrimination whatsoever occurred. In short, there was no hearing, or request for one, at which an attempt might have been made to obtain the minimal evidence needed to support appellant's present thesis.

Nor was this failure to seek such a hearing a mere oversight. As noted above, appellant's position at trial was that jurors on special panels and regular panels had "identical qualifications" (175A).

(2) Denial of appellant's pre-trial motion for inspection of bullets was not in derogation of the "due process clause"; moreover, no prejudice was, or can be, shown.

While there is no statutory right to pre-trial discovery and inspection in New York, case law has taken cognizance of this right where required by the "exigencies of defense". *People* v. *Golly,* 43 Misc. 2d 122, 123, 250 N. Y. S. 2d 210, 213 (Sup. Ct., N. Y. Co., 1964). See also *United States* v. *Garsson,* 291 F. 2d 646, 649 (S. D. N. Y., 1925) (opinion of

HAND, L., J.). Far from proffering persuasive reasons for examination of the bullets in question prior to trial, the appellant merely stated that they were "pertinent" (36A). Apparently conceding that prejudice must be shown before this issue becomes one of Constitutional magnitude, the appellant erroneously asserts that the denial of his pre-trial motion left him "in no position to assess Haase's [the prosecution's ballistics expert] testimony or to cross-examine him adequately" (Jurisdictional Statement, pp. 27, 50). Not only was Detective Haase cross-examined by the defense—without request for recess to permit further examination of the bullets—but his written reports on the subject were in Court throughout the proceedings pursuant to appellant's subpoena and, as the trial court observed, "were his to utilize as he saw fit" (3904).

Appellant's present claim of prejudice therefore rests solely on his post-trial "tender [of] expert evidence that Haase's testimony had been 'erroneous and misleading'" (Jurisdictional Statement, p. 27). From his analysis of the record, appellant's expert concluded that the jury was misled into believing that "all four bullets were shot from a single firearm" (*ibid.*). But a full reading of the record rebuts any such conclusion. Indeed, when asked "What type of weapon would the bullets have been discharged from?" Detective Haase responded, "They would be capable of being discharged from various rifles or pistols with a right six rifling" (267). It is true that his characterization of "right six rifling[s]" on each of the four missiles conflicts with earlier testimony that only three bullets bore indicia of "right twist rifling" and only one, MD-4, "right six," but this conflict was before the jury.

An analysis of earlier testimony clearly shows that Detective Haase found "six lands and grooves," or a right six rifling on only one bullet (265). Appellant's argument in the state courts that this caused utter confusion can be drawn entirely from the trial record, and was therefore, as the trial court noted, "open for cross-examination. Besides not agreeing with defendant's analysis of the testimony, its proffer is plainly untimely" (3904).

(3) Publicity did not interfere with appellant's right to a fair trial.

Appellant also contends that a "torrent of prejudicial publicity" instigated by the prosecution deprived him of a fair trial (Jurisdictional Statement, p. 51). The record lends no substantiation to this argument.

Despite the publicity that attended the arrest and arraignment of the appellant in the winter of early 1964, there is not one scintilla of proof tending to show that it interfered with his right to an impartial trial. The conflict that sometimes arises between a defendant's right to a fair trial and the Fourth Estate's right to publish is a genuinely troublesome one. But peaceful co-existence—demanded by the Constitution—is impossible when it is claimed, as here, that the mere occurrence of unfavorable publicity strips an accused of his constitutional safeguard.

While appellant now ignores the manner in which he protected himself against preconceived opinions, it is a matter of record that for many months prior to trial he was alert to the problem. He sought and obtained continuances from time to time expressly to postpone trial until the news-

paper accounts would be forgotten (61A). Then, in June, 1964, by habeas corpus petition, appellant moved for an immediate trial, and at the subsequent hearing his counsel referred to the publicity "at the time of arraignment or shortly thereafter, of the fact that it would be impossible then to receive a fair trial. I suppose everybody in this courtroom read the newspapers at that time. But time has passed since then. We are willing to go to trial now" (147A). Nor did he change his position four months later when the trial finally commenced even though the appellant had been free on bail since July of that year (161A-162A, 4-7). Thus, appellant's assertion that he faced the Hobson's choice of immediate trial or indefinite incarceration, while applicable to the June proceedings, no longer applied in October, 1964 (Jurisdictional Statement, p. 52). And yet his position, *vis-à-vis* proceeding to trial, remained unchanged in the autumn.

In addition to the foregoing acknowledgment, it is significant, and the Court of Appeals so observed, that the appellant never moved for a change of venue, the recognized method of avoiding the prejudicial effects of a plethora of local press accounts (Appendix to Jurisdictional Statement, p. 3a). See New York Code of Criminal Procedure, §344 (2).

The defendant cites a number of cases in support of his demand for a new trial on the ground of prejudicial statements *dehors* the courtroom. All stand for materially different propositions than the one he asserts here. Unlike the instant proceeding, in every one of those cases, the defense sought unsuccessfully either a change of venue from

the place where the trial was held or a continuance pending a lull in publicity.

Moreover, in the cases cited, the publicity complained of almost invariably occurred in the non-urban setting of the crime. Near-saturation of the local populace, and thus prospective jurors, was more likely. Where the crime did take place in a metropolitan setting, the proof tendered showed such extensive and bitter radio, television and press coverage that prospective jurors, both grand and petit, were necessarily exposed. Frequently the publicity included "substantial evidence" which in fact was not introduced at trial, such as a confession. In support of their motions for continuance or change of venue, the lawyers there involved offered substantiation for their charge, including polls testing the opinions of local citizenry. *E.g.*, *Sheppard* v. *Maxwell,* 384 U. S. 333, 345-6 (1966). Not only did the appellant by-pass such motions, but to this day, he has offered no support, other than his own statement, that jurors were prematurely partial.

In addition, all too often, in the cited cases, the trial judge gave only the most cursory admonition to the jurors concerning their obligation to avoid reading, or listening to discussions about the case. It is a matter of record that the court below admonished the jury on more than 80 separate occasions "not to look at, listen to or read" anything not received in evidence at trial. Interspersed with these directions were occasional warnings of contempt proceedings against jurors if they failed to obey. *Cf. Sheppard* v. *Maxwell, supra,* at p. 353. In commenting on the trial court's care, defense counsel observed, "I want to thank

your Honor for all the admonitions you have given the jury" (1675).

While the trial was in progress, a column appeared in a local newspaper which defendant deemed unfavorable to his defense. At the appellant's request, the court conducted a special *voir dire*. The result: not a single juror had read the article. *Cf. Sheppard* v. *Maxwell, supra,* at p. 357. Appellant now complains that one trier of fact saw —not read—the article, entitled in big print, "THE FEIN TRIAL."

His present unfounded charge that that juror must have been influenced flies in the face of an expressed representation to the contrary and appellant's acceptance of it at the time. The appellant neither moved to substitute that trier of fact with an alternate, nor suggested a mistrial.

The law should not, and will not, permit reversal where a defendant knowingly accedes to a given procedure for reasons of his own, and then, upon conviction, seeks further litigation upon the allegation that the very procedure he acceded to was error.

In sum, appellant has not shown that an impartial jury could not be, and was not in fact, chosen. See *Palmer* v. *United States,* 340 F. 2d 48, 50 (5th Cir., 1964), *cert. denied* 382 U. S. 903 (1965). His argument is completely devoid of facts showing "that any community prejudice ever existed or in any way affected the deliberations of the jury," the prerequisite he must meet to sustain his charge. *Stroble* v. *California,* 343 U. S. 181, 195 (1952).

(4) There was no violation of appellant's Fourth Amendment rights; indeed, his motion for a hearing was untimely, and his claim knowingly waived.

During the direct examination of appellant's friend, Mr. Tishman, the prosecution offered for identification a chair which had, on the day of the murder, been in the appellant's "Weissman" apartment (588). At that time defense counsel stated:

> "If this furniture purports to be furniture that was in the apartment, Apartment 5B, which is the apartment in question over here; and if that apartment was entered into without a search warrant; or in the alternative, since we have already heard some furniture had been stored in some furniture storage warehouse, if this furniture had been secured from this furniture storage warehouse without the proper legal warrant or proper legal authorization, I object to it; and I shall move to suppress this evidence; and if necessary to hold a hearing if the facts are as I have suggested" (588-9).

It was then agreed, after a conference among counsel, that the chair would be marked for identification so long as the defense was not deemed to have waived its right to "raise the question of a warrantless seizure of this piece of furniture and to raise the question of the legality of the evidence in a motion to suppress later" (593). "Later" arrived in eight days, during the direct examination of Mrs. Lazarus, on November 10, 1964, when the chair was offered in evidence (1192-3). The chair was received over a general objection and, contrary to appellant's statement, without a refusal by the trial judge to conduct a hearing (Jurisdic-

tional Statement, p. 46). There was simply no request for a hearing or *voir dire* to be refused (1193). Subsequently, appellant's attorney noted:

> "Now, if your Honor pleases, I move to strike from the record the introduction of the chair into evidence.
>
> "The Court: Overruled.
>
> "Mr. Kleinman: May I without a discussion about it, call your Honor's attention to a discussion we had at the bench one time a few weeks ago?
>
> "The Court: Yes, I am familiar with that; but under the testimony here, the objection is overruled" (1194).

And this was clearly a proper ruling, for the evidence before the court left no alternative. Mrs. Lazarus had been advised by the appellant to remove all the furniture, including the chair, from the 63rd Street apartment. "Just get rid of it. I don't care what you do with it," he told her (1173). Mrs. Lazarus' solution was to hide the furniture in a warehouse she had dealt with in the past (1173-4, 1193). Contrary to appellant's present observation (Jurisdictional Statement, p. 25), the method of disposal was her own, not "pursuant to appellant's instructions."

From the foregoing, it is beyond serious dispute that the appellant abandoned his title to and possession of the chair when he left it to Mrs. Lazarus to dispose of it as she would. When she placed it in the Century Moving & Storage Warehouse, her feminine reaction against destroying perfectly good property, appellant retained no rights cognizable by the Fourth Amendment which could have been breached by the subsequent acquisition of the property by law enforcement authorities.

Mrs. Lazarus' testimony in this regard was never challenged by the appellant. And the reason for his attorney's perfunctory objection is obvious. Defense counsel initially based his statement on an incomplete understanding of the facts relating to the seizure (588-9). The warrantless search of the warehouse took on an entirely different legal significance when it became clear that the appellant had abandoned the chair. E.g. *Hester* v. *United States,* 265 U. S. 57 (1924); *Abel* v. *United States,* 362 U. S. 217 (1960); *People* v. *Robinson,* 15 N. Y. 2d 559 (1964). The necessary conclusion was that the appellant was in no position to complain for the furniture was no longer his, and, more important, Mrs. Lazarus had the right to turn it over to anyone at all, including law enforcement officers. Indeed, on the day she was finally picked up by the police, she was attempting to change the name of the bailor from Weissman to Williams, an attempt which was solely "her idea" (1643).

Appellant's present chastisement of the trial court for not expressly stating its basis for denying the suppression motion is contrived. The conclusion that appellant draws therefrom, that only with such judicial opinion could Mrs. Lazarus "have been fully cross-examined" (Jurisdictional Statement, p. 46), is astonishing. If he wanted, or needed, the "theory" for the Court's ruling prior to cross examination, he should have asked for it, or made his motion when it ought to have been made—before the trial commenced.

Appellant misstates the law of New York, when he contends that "When a motion to suppress evidence is made during trial, the court shall hold a hearing" (Jurisdictional Statement, p. 45, n. 19). Section 813-d of New York Code

of Criminal Procedure provides that a defendant shall make his motion to suppress only before the trial commences unless he falls within one of several expressed exceptions, none of which applies, or was urged. The People's argument to this effect was never rejected by the state courts nor answered by appellant.

Appellant also claims that certain facts suggesting that the chair was unlawfully seized are "not disputed." Of course they are. But this "dispute" is no longer an issue of concern to the courts. Counsel's failure to seek a hearing to suppress the evidence constitutes a complete and deliberate waiver. There cannot be the slightest doubt that this constitutional point, like so many others, is waivable. This is particularly so where, as here, the appellant was represented by eminent and experienced attorneys who displayed complete familiarity with the liberal and frequently utilized procedures for litigating the issue in the *nisi prius* court. Under the circumstances, it is as fruitless as it is unnecessary to scan the record for probable cause or consent. The issue having been waived, there was no occasion for adducing whatever evidence there might be.

Finally, the appellant has no standing to suppress this evidence. This Court has explicitly stated:

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been the victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. *Jones* v. *United States,* 362 U. S. 257, 261 (1960).

See also, *Wong Sun* v. *United States,* 371 U. S. 471, 474 (1963); *Murray* v. *United States,* 333 F. 2d 409, 411-12 (10th Cir. 1964), *cert. denied* 380 U. S. 527 (1964); *Fox* v. *State,* 383 S. W. 2d 25, 28 (1964), *cert. denied sub nom. Thomerson* v. *Tennessee,* 33 L. W. 3294 (1965); *Elkins* v. *United States,* 364 U. S. 206 (1959); *Watson* v. *United States,* 219 F. Supp. 666, 673 (S. D. N. Y., 1963), *cert. denied* 379 U. S. 827 (1964); *United States* v. *Granello,* 243 F. Supp. 325 (S. D. N. Y., 1965); *Shimon* v. *United States,* 352 F.2d 449, 451-2 (D. C. Cir. 1965).

Since he was not the person whose rights were allegedly offended, the appellant cannot be heard to complain that he is the victim of an illegal search of the Century Moving & Storage Warehouse.

(5) The prosecution cannot be cited for an interference with appellant's constitutional rights owing to his failure to examine a report he subpoenaed; in any event, there was no prejudice.

Appellant contends that the prosecutor's failure "to make known to the defense Detective Kelly's ballistics report" violated his constitutional right (although he does not specify upon which Amendment he relies) (Jurisdictional Statement, pp. 23-4, 37-8). He misconstrues the prosecutor's obligation. Detective Kelly's report (150B) was subpoenaed by the defense, at the outset of the trial, and in the physical possession of the court during the trial 13904). Appellant's present speculation that he could not have obtained possession of it unless "the defense specifically requested it" is without substantiation. There were numerous occasions where a general request by defense

counsel brought forth all documents related to a witness' testimony (*e.g.*, 1553-7). As the trial judge noted, the Kelly report was "his to utilize as he saw fit. His choice having been made, he is bound by it" (3904).

Seeking to cover his failure to make use of this report, the appellant charges that the prosecutor had an affirmative obligation to disclose its existence. Of course this is not so.

A case in which the question of "affirmative disclosure" is thoughtfully discussed is *Jordan* v. *Bondy,* 114 F. 2d 599 (D. C. Cir., 1940). There the trial assistant failed to bring to the attention of defense counsel a police departmental record, or "police incidental," which described the suspect as six inches taller than the defendant's actual height. In rejecting defendant's argument that this constituted reversible error, Mr. Justice RUTLEDGE, speaking for the court, observed, at pp. 602-3,

> "In effect they would impose upon the prosecuting officer the duty not only to represent the public, but to represent the accused so far as not only to disclose but to discover evidence which might be considered material to the defense, regardless to some extent of its admissibility, its merely cumulative effect, its equal availability to the accused, and its probable probative effect. Nothing in the Constitution or statutes imposes so broad an obligation.
>
> * * *
>
> "There is nothing to show that the incidental was suppressed. It was a public record, available for public inspection and therefore as much so to appellant and his counsel as to the prosecution. The record does not

> show that appellant's counsel at the trial, now deceased, did not know of its existence or contents, though present counsel of course learned of them later and sought to make use of them as newly discovered evidence. No facts were proved to show any attempt to conceal the existence or contents of the incidental. The most that appears is that they did not call it to the attention of the court or of counsel for the defense."

As the Appellate Division observed, in New York "the true test of what must be disclosed is that of simple fairness" (3966). That there was no violation of this mandate is certain because Detective Kelly's report is evidence of nothing. He probed the hole in the floor of apartment 5-B "for ballistics evidence without results" (150 B). Confirming the plain meaning of this language, he later observed in an affidavit, "This specifically means that I did not find a spent bullet or any fragments which could be identified as coming from a bullet. Due to the condition of the hole I cannot say one way or the other whether the hole in its original state was caused by the entrance of a bullet" (517 B). In other words it was "an inconclusive naked eye examination" (Appendix to Jurisdictional Statement, p. 4a). Following this inspection, the floor boards were sent to the police laboratory. There, Detective O'Brien examined the area through a microscope and discerned "three minute fragments of metallic residue" (1724). This, of course, in no way conflicted with Detective Kelly's inability to discover the same with his naked eye. Rather, it "fully superseded" the Kelly test (Appendix to Jurisdictional Statement, p. 4a).

The defendant does not claim that he was deprived of Detective O'Brien's laboratory report.

Appellant's assertion that "O'Brien merely testified that the wood putty in a hole in the floor board in the apartment contained some metal residue which 'could have been' 'consistent with being part of a bullet'" (Jurisdictional Statement, p. 24), is misleading. He uses this erroneous statement of fact to imply that the three minute fragments may have come from the chemistry of the plastic filler. There is no evidence that the plastic filler contained lead residue. The only recorded testimony on the subject is: "The miscroscopic examination [of the interior of the hole] revealed the presence of plastic filler adhering to the wood constituting the hole itself, and it also revealed the presence of three minute fragments" (1724). These three fragments were then tested; two "were positive for the presence of lead" and "consistent with being part of a bullet (1725-6).

(6) Failure to supply appellant with Dagmar's address in no way deprived him of a fair trial; moreover her tale and her existence were known by the defense.

Appellant contends that "the prosecution's systematic course of suppression" *vis-à-vis* Dagmar Finch Generazio deprived him of a fair trial (Jurisdictional Statement, pp. 18, 40). Dagmar, a prostitute, was the friend whom Mrs. Lazarus allegedly telephoned seeking a car to move a box (2550-1, 2554). When questioned by the police and prosecutor on several occasions, Dagmar fixed the hour of the call variously between 6:00 p.m. and 9:00 p.m., on a day in late September or early October, 1963, recalling that she received it while at Gail Weiner Tracy's apartment (2300-7, 2315-16, 2370-6, 3344-9, 3352, 3357). At the hearing Dagmar testified that the call came between 3:00 and 4:00 p.m.

on October 10, 1963, and that, with but one brief exception, she had repeatedly so advised the prosecution (2547, 2550-1, 2599, 2728, 2805). Both statements were false.

At the latter proceeding, her husband, who was present when Dagmar was first interrogated by the police, corroborated, with some embellishments, that part of her account (2467-9). Gail Weiner Tracy, the girl with whom the then-single Dagmar was living, confirmed that a "week or so" before her October 13th birthday she answered the telephone and the caller, Gloria (Mrs. Lazarus), asked to speak to Dagmar (3523, 3527, 3594, 3683). Mrs. Tracy gave Dagmar the receiver and then heard her say, "no, no, no" into the telephone (3573). Mrs. Tracy noted, with some confusion, that the call came shortly after she took her three o'clock epilepsy pills (3594, 3600-1, 468 B). But she also conceded that during the seven month period she had discussed the subject with the prosecutor, she had, with but one post-trial equivocation, invariably denied altogether the occurrence of such a call and had, on one occasion, done so in Dagmar's presence (3530-3, 3535-8, 3541).

On the other hand, the trial assistant, Vincent J. Dermody, testified that when he first spoke to Dagmar she told of receiving a phone call from Mrs. Lazarus sometime in the latter part of September or early October and placed the time by inquiring "could it have been around 8 or 9 o'clock?" (3344-5, 3352). In an effort to fix the hour of the call more precisely, Dagmar recounted the events of that day in some detail, finally concluding that it occurred "sometime after seven o'clock possibly between six and seven, but I'm not sure. * * * All I know is that it was dark out, and when I entered the building the dry cleaning

man was getting ready to close his store'' (3345-9). She never retracted this account of her activities or claimed confusion (3360).

On a second visit to the District Attorney's Office Dagmar confronted Gail Weiner Tracy with her story of receiving a phone call at her house ''sometime after or between 6:00 p.m. and 7:00 p.m. (3357). Before she could finish, Mrs. Tracy called her a liar, saying she never received a call on her phone from Mrs. Lazarus at any time (3357). Mrs. Tracy never retracted this denial (3384).

On a third visit to his office, Dagmar again assured Mr. Dermody that the late September or early October call came between 6:00 pm and 7:00 p.m., ''or even possibly later'' (3360-1, 3499).

Detective Leman testified to several conversations with Dagmar, including one at her house (2298-9). He was told that the call she had received from Mrs. Lazarus occurred ''Maybe it was eight o'clock or nine o'clock'' and, ''after six and close to seven p.m.'' (2315-16, 2372, 2431).

After hearing all the witnesses, the trial court found Dagmar Generazio a completely untruthful witness and rejected her testimony that she had received a call at any time. With customary thoroughness, the court, describing the basis for this conclusion, wrote:

> ''Having seen and heard this witness [Dagmar Finch Generazio], I reject her testimony as totally unworthy of belief. While under oath at the hearing she strained with tireless effort to avoid telling the truth, whether the examination covered her recorded criminal past, the date of her marriage, the frequency

which the police telephoned her, or the reaction of Gail Weiner Tracy * * * upon a certain confrontation. The foregoing are all measurable standards, but of no greater import than the impression this witness created when set against less tangible marks. I find that she never told the prosecution of receiving a call on any afternoon. I further find that insofar as this witness' credibility is concerned, her story that she received any call from Mrs. Lazarus on the day, or month, of the killing does not warrant belief.

* * *

"Sergeant Russell Generazio, the estranged husband of Dagmar, testified to certain conversations had with representatives of the prosecution which corroborated his wife's story in most of the material aspects. The witness, who frankly admitted a consuming interest in winning anew his wife's affections, continuously expressed by word and deed his desire to ingratiate himself in her favor during the several days the two were in court. Viewed most charitably, his testimony does not realize the level of probity required" (3907-8).

* * *

"Her [Gail Weiner Tracy] testimony is that although she insisted without variation for months on end that no call had come to her apartment despite the most persistent efforts of the prosecutor, a two hour conference with the defendant's attorney brought forth the vivid recollection and admission of the hour and date of such a call. Subsequently on the very day she allegedly offered this assistance to the defendant, she called the District Attorney's office and advised that the defense had tried to buy her off since her observations were harmful to their cause. Thereafter she left her home for some days in an effort to avoid process. But without detailing the unwholesome taste

> Mrs. Tracy's narration leaves concerning all of the circumstances immediately preceding her appearance in court, I find that on the basis of her entire testimony she is not worthy of belief. Indeed, one glaring and unexplained contradiction is her statement in the question and answer that she fixed the time of the call as shortly after 3 P. M. because she had just taken her Dilantin and Phelantin pills, and her statement at the hearing that she took these pills only at 9 A. M. and 9 P. M. At 3 P. M. she used the Dilantin pill alone—her unvarying practice for thirteen years. If she had just taken the two pills she claims in the question and answer, the hour was obviously no where near 3 P. M. In any event, the fact that she could pinpoint the date and hour of a phone call 18 months ago with such accuracy, but remains unable to fix the day of a meeting with an attorney for the defendant the very week of the hearing indicates the want of credibility attaching to her" (3912-13).

The court clearly had power to dispose of this issue on the sole ground that witnesses proffered lacked sufficient credibility to warrant a new trial. Those courts which have discussed this subject, have consistently affirmed that

> "the trial judge who approaches the question of the probable effect of the new evidence upon the result, in the event of a new trial, should be vested with a broad discretion in considering matters of credibility as well as of materiality. Stringent or artificial limitations upon the exercise of the discretionary power of the trial judge to grant new trials could only subvert the purpose of the remedy." *Jones* v. *United States,* 279 F. 2d 433, 463 (4th Cir., 1960).

See also, *United States* v. *Lewis,* 338 F. 2d 137 (6th Cir., 1964), cert. den. 33 L. W. 3347 #980; *People* v. *Shea,* 16

Misc. 111 (1896); *People* v. *Dunn,* 194 Misc. 442 (1948); *People* v. *Norman,* 1 Cal. Rept. 699 (2nd Dist., 1960).

The lengthy post-trial record offering support, in depth, for Judge Culkin's findings concerning credibility, his decision should not be disturbed. The confirmations of these findings by the Appellate Division [Dagmar was "clearly not * * * a source that a jury would be expected to credit" (3967)], and the Court of Appeals (Appendix to Jurisdictional Statement, pp. 11a-12a), fixes them irrevocably. Speaking for the Supreme Court in *United States* v. *Johnson,* 327 U. S. 106, 111-12 (1946), Mr. Justice BLACK observed:

> "But it is not the province of this Court or the circuit court of appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact [cits. om.]. While this appellate court might intervene when the findings of fact are wholly unsupported by the record, [cits. om.], it should never do so where it does not clearly appear that the findings are not supported by any evidence".
>
> * * *
>
> "While a defendant should be afforded the full benefit of this type of rectifying motion, courts should be on the alert to see that the privilege of its use is not abused. One of the most effective methods of preventing this abuse is for appellate courts to refrain from reviewing findings of fact which have evidence to support them. The circuit court of appeals was right in the first instance, when it declared that it did not sit to try de novo motions for a new trial" (327 U. S. at p. 113).

Beyond these considerations, it should be observed that Dagmar's story does not relate directly to the issue of the appellant's guilt or innocence. At most, it pricks Mrs. Lazarus' credibility on a peripheral issue: her denial that she telephoned Dagmar. Therefore, it is not grounds for a new trial. In an opinion that has remained unimpeached for over half a century, the New York Court of Appeals wrote, in *People* v. *Eng Hing and Lee Dock,* 212 N. Y. 373, 386 (1914):

> "The obvious purpose of the motion was to discredit the testimony of the two women * * *. This court has said (per Martin, J.) that a motion for a new trial should not be granted if the evidence is 'merely impeaching or contradicting the former evidence' (cits. om.)".
>
> * * *
>
> "The whole proceeding, from beginning to end, was simply an effort to impeach the witnesses Florence Wong and Grace Mack; and that, as we have seen, is not a sufficient reason for granting a new trial on the ground of newly discovered evidence, even where the impeachment is successful" [212 N. Y. at pp. 392-3].

See also *People* v. *Becker,* 215 N. Y. 126 (1915); *United States* v. *Hiss,* 107 F. Supp. 128, 136 (S. D. N. Y., 1952), aff'd 201 F. 2d 372 (2d Cir., 1953), *cert. den. sub nom. Hiss* v. *United States,* 345 U. S. 942 (1953); *United States* v. *Switzer,* 252 F. 2d 139, 146 (2d Cir., 1958) (opinion by CLARK, J.).

In an effort to prove that Dagmar Generazio's story is exculpatory, appellant now claims that he was the victim of an "extortion and blackmail scheme * * * obviously plotted" by Mrs. Lazarus (180B; Jurisdictional State-

ment, p. 11). His failure to tender this defense earlier apparently has its dual source in his being "not overly concerned as the date of his trial approached" and counsel's advice that he need not testify (179B; A. Br. to App. Div., p. 205). Be that as it may, new trials will not be granted solely to permit new defenses.

Moreover, even if Mrs. Lazarus did telephone Dagmar for a car to move a box, this would in no reasonable way tend to disprove appellant's murderous deed. The outlandish "blackmail" theory suggested is not even supported, much less proved by the testimony offered. Such a telephone call does not eradicate the appellant's complicity in the murder, nor does it transform Mrs. Lazarus into the engineer of an extortion plot directed at him.

If the call came at 6:00 p.m., the earliest hour at which Dagmar's equivocal pre-trial account ever fixed it, it would be completely consistent with the prosecution's theory, though contradicting Mrs. Lazarus when she testified at trial to the effect that she had not telephoned Dagmar (1346). If the call came shortly after 3:00 p.m., the present claim, at the most it might also tend to inculpate her as having had advance knowledge of the murder plan. But no reasonable inference from this fact exonerates the appellant.

Moreover, without condoning perjury by Mrs. Lazarus, assuming *pro arguendo* that perjury it was, it related to an issue totally apart from guilt or innocence. And as the trial court observed, "suffice it to say that her character and reputation never were an issue" (3910). The prosecu-

tion did not offer her as virtue incarnate, but rather as an eyewitness chosen by the defendant because she dwelt in "the depths that the defendant stooped to" (2120). The summation commended her not because she was beyond lying, but because she brought forth certain vital post-crime evidence. Indeed, little could be added to the clear and forceful manner in which the defense, throughout the trial, painted her untruthful instincts. It is apparent that the jury accepted material portions of her recital because they had the ring of truth, not because they had any illusions concerning the impeachability of her veracity.

Further, try though he may, there is no escaping the fact that the appellant knew, while the trial was yet in progress, that a girl named Dagmar Finch had advised the district attorney that on October 10, 1963, Mrs. Lazarus had telephoned her in an attempt to borrow a car (3018-19). Aside from one passing attempt by a private investigator, Mr. Whelan, to obtain her phone number from Detective Leman ["I didn't expect he would give it to me. In fact, he says, 'I'm not at liberty to give it to you' " (2930)], not one member of the defense ever indicated to the prosecution that any difficulty existed in locating her. The last the trial assistant knew was that Detective Leman had directed Mr. Whelan to Dagmar's mother in Baltimore, and that defense counsel referred to her during the cross-examination of Miss Boxer (765-6). Thus, the present case is clearly distinct from the many cases defendant cites in support of his "affirmative disclosure" theory (Jurisdictional Statement, pp. 36, 38-9). In each of them the defense was, at trial, entirely unaware of the evidence it later submitted.

Appellant now belittles his failure to ask for Dagmar's address (Jurisdictional Statement, p. 39), but in light of his knowledge of her existence and her story that omission alone is fatal to his cause. Under these circumstances the requisite of diligence is statutory and immutable. See New York Code of Criminal Procedure §465 (7); *United States* v. *Costello,* 255 F. 2d 876, 880-1 (2d Cir., 1958); *United States* v. *Lombardozzi,* 343 F. 2d 127 (2d Cir., 1965). A special exception cannot be made in this case.

Failing to show a deprivation of material exculpatory evidence, the appellant now attempts to transform his contention into a claim of prosecutorial connivance in the use of perjury. The significance of this rests in the case law, for unlike the standards to be met before a second trial will be held on the ground of newly discovered evidence, the appellant, in order to obtain another trial, need only show that the District Attorney failed to correct testimony he knew to be perjured. This follows even where the sole point goes to the credibility of that witness. Notwithstanding appellant's analysis to the contrary (Jurisdictional Statement, p. 40), New York's decisional law, including the case at bar, is founded firmly upon these principles. The record, however, does not support the charge that the prosecutor engaged in any such wrongdoing. Indeed, the perjury claimed is non-existent.

The appellant specifically argues that the failure of the prosecutor to "correct" that testimony of Detective Leman and Mrs. Lazarus, which omitted Dagmar's name when listing those present at the time of the second recantation, deprived him of a fair trial (Jurisdictional State-

ment, pp. 17, 40). Appellant adds that this error was compounded because the prosecutor failed to rectify the erroneous explanations given by these two witnesses as to the cause of Mrs. Lazarus' second recantation, and was, presumably, further aggravated when he concealed the details of the confrontation between the two women. As noted above, the record will not support this indictment against the trial assistant.

At the trial, Mrs. Lazarus testified that on September 28, 1964, she saw Mr. Dermody; Detectives Lyons and Leman were also present (1392-3). She recalled no one else there (1393). Upon inquiry as to why she had recanted on that date, Mrs. Lazarus responded, "For the same reason" as in June ["I truly felt sorry for the defendant and felt that my testimony would be detrimental" (1428)]; "The idea of coming here and saying these things that might hurt this man was against all my principles" (1429).

At trial, Detective Leman also omitted Dagmar's name from the list of those present at the second recantation (1635-7). When the moment arrived where Mrs. Lazarus directed him to leave the room, Detective Leman told the jury, "she accused me of questioning friends of hers, and being a—she accused me of being a Gestapo agent" (1666).

At the post-trial hearing, Mr. Dermody testified that when the two women confronted each other, Mrs. Lazarus "started to yell, and she accused Detective Leman of getting people to say things that weren't true about her" (3362-3). Detective Leman then took Dagmar out of the

room and at about the same time Mrs. Lazarus spoke by telephone with her lawyer (3363, 3497). Mrs. Lazarus

"blamed Detective Leman for cooking these things up and having these witnesses tell these stories" (3501).

"She was mad at Leman. She accused Leman of trumping up this story, getting Dagmar to trump up this story about her; and out of spite to Leman, she told us she wouldn't testify and said that Fein never said it" (3507).

* * *

"Q. According to your testimony, Mr. Dermody, when Dagmar confronted Gloria and gave her statement that you say she gave to you, it was after that that you say that Gloria changed her mind and said she had lied about what she told you?

"A. But sometime after. This was not a spontaneous exclamation on her part.

"Q. Sometime the same day?

"A. That same day, but later on.

"Q. And later on—how long? It was while Dagmar was still in the room, was it not, sir?

"A. No, it was not.

"Q. It was afterwards?

"A. Yes. Dagmar, as far as I can—certainly she wasn't in the room.

"Q. All right.

"A. Well, I can't swear that Dagmar had already left the building" (3508-9).

At the post-trial hearing Detective Leman testified, in response to specific questioning, that on September 28, Mrs. Lazarus "just exploded" upon hearing Dagmar's account of the telephone call (2326). As he recollected, Dag-

mar left the room before Mrs. Lazarus (2328). He also departed, although he does not indicate when, and was not present when Mrs. Lazarus actually changed her story (2328-9).

Although the entire sequence of events is not clearly set forth in the record, the evidence is undisputed that Mrs. Lazarus "exploded" upon being confronted by Dagmar's story, but did not recant until sometime later. When she did recant Dagmar was not present, nor was Detective Leman. Indeed, he seems to have escorted Dagmar out, returned, and then been directed out later on at Mrs. Lazarus' insistence. If this is so, then the police officer was accurate in omitting Dagmar's name from aming those present at that time (1638). She was not there. Mr. Dermody's description that "She was mad at Leman," "accused Leman of trumping up this story, getting Dagmar to trump up this story * * * out of spite to Leman she told us she wouldn't testify," in no way conflicts with the detective's account at trial; "she accused me of questioning friends of hers * * * of being a Gestapo agent."* The post-trial examination was simply gone into a greater length and with greater specificity.

The brief examination covering the persons present with Mrs. Lazarus when she recanted lacked the coverage with which appellant would now cloak it. As the Appellate Division succinctly concluded, "who was present at the interview was not emphasized and received only cursory attention" (3969). The specific questions certainly

* If this prosecution witness was conspiring to conceal by committing perjury, certainly he would not have volunteered this provocative item to defense counsel at trial.

did not cover all the people Mrs. Lazarus met during her entire visit on September 28th. And yet, without such a broad scope, it is difficult to see how she, or the trial assistant, could be aware that the answer given might be construed as inaccurate at a later date. Its very ambiguity left it to the listener to interpret. Thus, while the defendant may presently insist that the question covered only one point of concern, the contrary can just as reasonably be argued. Indeed, Mrs. Lazarus' omission of Dagmar's name from among those present at the moment of recantation was an accurate account. Dagmar was not there. (See also opinion of App. Div., 3968.)

Appellant now urges that Detective Leman must have been testifying about the earlier meeting when Dagmar was present and not the moment of recantation, because he was not there at that later hour (Jurisdictional Statement, p. 19). But the premise of appellant's argument exposes the invalidity of his conclusion. When Detective Leman later learned of Mrs. Lazarus' change of story, he obviously surmised who was still present. Certainly he knew that Dagmar was not; he had previously escorted her out. Thus, he spoke with accuracy in listing those present at the time of recantation.

The record repeatedly demonstrates that the trial assistant was continuously on guard that the events should be fully and accurately presented to the jury. In an unusual aside, Judge KEATING, speaking for the Court, lauded the prosecutor for his "strong sense of fairness" (Jurisdictional Statement, p. 10a). At least twice during Mrs. Lazarus' testimony he called the court's, and the appellant's

attention to inaccuracies, once in connection with her denial of having seen certain grand jury minutes (1414-15), and again in relation to the disposition of criminal charges she yet faced (1421-3). Any doubt existing as to what interpretation attaches to the appellant's non-specific question should clearly be resolved in favor of this prosecutor.

Why Mrs. Lazarus temporarily altered her account is plainly not subject to objective analysis alone. Detective Leman's interpretation of her act differed from Mrs. Lazarus' explanation. Perhaps both were correct. Of paramount importance is that each explanation was before the jury, as was, of course, the act of recantation itself. But surely it cannot be held against the prosecutor because he failed to tender his subjective understanding of why Mrs. Lazarus did something, an understanding which, incidentally, coincided with that already offered by Detective Leman.

While the cause for Mrs. Lazarus' recantation appeared twofold at trial, the record will not support appellant's present attribution of motive for recantation to the confrontation with Dagmar (Jurisdictional Statement, pp. 11-12, 17, 39). To conclude so is sheer speculation. The argument he builds therefrom—that it was error not to give the details of that meeting—must fall, as it is without foundation.

Lastly, the defendant seems to contend, although not clearly arguing it, that Mrs. Lazarus committed perjury when she denied making more than one telephone call for a car, and that it was error for the prosecutor not to point this out.

If Mrs. Lazarus lied about either of Dagmar's stories (and there is no reason to believe that she was ever confronted with the tale of the 3:00 p.m. call), it still would not amount to a deprivation of due process. Of course, the prosecutor's knowing use of perjured testimony either through subornation or by allowing known perjured testimony to remain uncontroverted is a deprivation of constitutional rights [*Wilde* v. *Wyoming*, 362 U. S. 607 (1960); *Napue* v. *Illinois*, 360 U. S. 264 (1959); *Alcorta* v. *Texas*, 355 U. S. 28 (1957); *Pyle* v. *Kansas*, 317 U. S. 213 (1942)]. However, the courts have fairly consistently held that knowledge of the perjury by the prosecution is essential in order to effect a deprivation of due process [*People* v. *Robertson*, 12 N. Y. 2d 355 (1963); *People* v. *Fanning*, 300 N. Y. 593 (1949); *Mooney* v. *Holohan*, 294 U. S. 103 (1935); *United States* v. *Jakalski*, 237 F. 2d 503 (7th Cir., 1956), *cert. denied* 353 U. S. 939 (1957); *Wild* v. *Oklahoma*, 187 F. 2d 400 (10th Cir., 1951); *United States* v. *Kaplan*, 101 F. Supp. 7 (S. D. N. Y., 1951); *Tilghman* v. *Hunter*, 167 F. 2d 661 (10th Cir., 1948); *Wagner* v. *Hunter*, 161 F. 2d 601 (10th Cir., 1947); *Casebeer* v. *Hudspeth*, 121 F. 2d 914 (10th Cir., 1941), *cert. denied* 316 U. S. 683 (1941)]. In *Jakalski*, the court stated:

> "The introduction of perjured testimony without more does not violate the constitutional rights of the accused. It is the knowing and intentional use of such testimony by the prosecuting authorities that is a denial of due process of law" (237 F. 2d at pp. 504-5).

Far from being a "knowing and intentional use" of perjury, the prosecutor had found an eyewitness who refuted Dagmar's account and thereby corroborated Mrs. Lazarus'.

In the unusual cases which have granted relief despite the lack of prosecutorial knowledge, the conviction could not have possibly been sustained without the perjury [*Jones* v. *Kentucky*, 97 F. 2d 335 (6th Cir., 1938)], or the perjurors directly contradicted the defendant's testimony on a material issue [*Curran* v. *Delaware*, 259 F. 2d 707 (3d Cir., 1958)]. Neither exception applies here.

Moreover, it may be noted that the *Curran* decision was predicated upon an erroneous reading of *Pyle* v. *Kansas* [317 U. S. 213 (1942)]. In *Curran* the court dispensed with the necessity of prosecutorial knowledge that the testimony was perjured by specifically citing *Pyle* as a case where such knowledge was not required [at p. 713]. Nevertheless, the United States Supreme Court in *Pyle* accepted as true the allegation that "the Kansas prosecuting authorities obtained his conviction by the presentation of testimony known to be perjured," (at pp. 214, 216), and remanded that cause for a hearing to determine the verity of the allegations.

Finally, while it is incumbent for the prosecutor to keep the defense fully advised in such matters as pertain to perjury, had the prosecutor known Mrs. Lazarus to be "perjuring" herself, his disclosure in the case at bar would have been mere form, for the defense already knew of Dagmar's account. See *Commonwealth* v. *Heffernan*, 213 N. E. 2d 399, 404 (1966), *cert. denied sub nom. Heffernan* v. *Massachusetts*, —— U. S. ——, 34 U. S. L. W. 3405 (1966); *Green* v. *United States*, 158 F. Supp. 804, 809 (D. Mass 1958) (opinion by WYZANSKI, J.); aff'd 256 F. 2d 483 (1st Cir. 1958).

(7) There was no prosecutorial suppression of Sandar Ede's "evidence."

The appellant also offers Sanda Ede as the basis for a new trial. She was the prostitute who took messages for her friend Mrs. Lazarus at the latter's apartment and was present when the appellant called seeking help in the late afternoon of October 10, 1963 (1133-34). After Mrs. Lazarus had responded to that call and departed, Miss Boxer arrived at Mrs. Lazarus' building, pursuant with their prearranged rendezvous (705-6). Upon conversing on the lobby intercom with Miss Ede, Miss Boxer went to the "Weissman" apartment at 406 East 63rd Street (708-9). There she helped the appellant attempt to conceal the murder.

Near the conclusion of the People's case the prosecutor observed that when Miss Ede had been questioned at the District Attorney's Office, she

> "claimed to have had no recollection of the events that allegedly transpired on October the 10th.
>
> "It is for that reason that the People did not call her as a witness. However, I want to furnish counsel with the name, full name of this person, and her address for their benefit, so that they can do whatever they want with it.
>
> "The name of the woman is Sandra Ede—E-d-e. She resides at 2575 Palisade Avenue, Riverdale, New York" (1747).

The appellant contends that this statement was misleading, that Miss Ede had in fact given the prosecutor a different, and exculpatory, account indicating that although

she had no recollection about October 10, 1963, she never gave any message over the intercom. Even if true, this collateral point is here magnified out of all proportion to its significance in the case.

Eschewing restraint, and recorded facts, the appellant in moving for a new trial also charged that the prosecution met "repeatedly" with Miss Ede and "pressed her * * * to lie for them" (31 B-32 B). Unsuccessful, the prosecution then transcribed a statement, and "The police and prosecutor hounded her until her health broke and she was institutionalized" (32 B). Appellant concluded that the "ploy" of giving the defense her name and address was "doubly misleading"; the substance of her story was misrepresented and "previous defense counsel could not even contact Sandra, at the time, because she was under psychiatric care in a hospital" (33 B).

Miss Ede herself refutes most of these vicious charges, and all of the credible, material, and relevant evidence establishes both the lack of merit to her present story and the absolute correctness of the trial assistant's behavior.

After hearing Miss Ede, and Messrs. Leman, Dermody and Herman (Chief of the District Attorney's Homicide Bureau who interviewed Miss Ede prior to trial), the trial court wrote:

> "In court she [Miss Ede] indicated, although with some ambiguity, that it was her practice not to speak to anyone over the intercom, and it is clearly this general procedure that she refers to in the questions and answers. But it is equally certain that this witness, who was exceptionally anxious not to be a witness—

either at the trial or at the hearing—consistently advised all of the representatives of the prosecution repeatedly she could not recollect "one way or the other" the events of October 10, 1963, or any other day during that period, with respect to her participation in a conversation over the intercom with Geri Boxer. Faced with a witness of now proven instability whom he had every reason to believe was withholding information helpful to his case, the prosecutor acted appropriately when he advised the defense of her name and address. He was under no obligation to volunteer her entire story and defendant's prayer for that proposition is rejected as unprecedented. It is also considered significant that the defendant was not only aware of Miss Ede, but interrogated Miss Boxer at the trial as to whether Miss Ede did not have a different recollection than Miss Boxer's. Miss Ede herself supports Miss Boxer's answer which was 'she said she didn't remember.' It is further certain that the statements by defendant's attorney concerning the inaccessibility of Miss Ede, at the time her name was tendered by Mr. Dermody at trial, are inaccurate. She was available as a witness past the time the defense rested, and the conclusion that the defense consciously rejected the idea of speaking with her is irresistible and is supported by their refusal to obtain an affidavit from Mr. Kleinman on this subject, in spite of this court's express request. Similarly, it is plain that the defendant's charges that the prosecution harrassed Miss Ede until she was driven to a mental institution is without one scintilla of proof. Miss Ede denied ever making such a charge" (3906-7).

On appeal, the gravamen of appellant's contention revolves about Miss Ede's present claim that she never gave messages over the intercom. Mr. Dermody flatly denied

ever being so advised (3375), as did Detective Leman (2411, 2422-3) and Mr. Herman (3288).

In arguing that the Appellate Division expressly "found" that Miss Ede had told the prosecution of not passing on the message, appellant misinterprets that opinion (Jurisdictional Statement, p. 21). The only judicial "findings" in the record are those of Judge Culkin, quoted in part on the preceding two pages. When the appellate court writes, "On the motion for a new trial it was established that," the word "motion" must be defined as limited to the pre-hearing papers. Twice elsewhere in the Appellate Division opinion, the word "motion" is used in this narrower, but nonetheless proper, sense (See footnotes at 3958, 3963.) Where there is sufficient in the record to support the trial court's findings, it cannot be assumed, as appellant does, that they were overruled *sub silento*. The main thrust of Mr. Justice Steuer's opinion is that, on the basis of the affidavits presented, no hearing was warranted on the Ede matter. Thus, the court writes, "whether or not" the claimed matter was disclosed by the prosecutor, the defense already knew about her and therefore the "contention of concealment was not proved" (3963). This conclusion, incidentally, is the same one the prosecution reached prior to the hearing (488B). In adopting the broader definition of the word "motion" appellant is left with a structural contradiction which, in the state courts, he could only explain away as "egregious error" (A. brief to N.Y. Ct. of Ap., p. 36); in limiting the definition the inherent logic of the opinion follows throughout. Plainly the narrower interpretation is the one to be selected, as was done by the New

York Court of Appeals (Appendix to Jurisdictional Statement, p. 4a).

The trial assistant was faced with a witness who had every reason to know whether or not she had a role in the singular whirl of events which followed the appellant's request for help, but who steadfastly equivocated. She would neither affirm nor deny, repeating endlessly, "I don't remember."

In an effort to ascertain the truth, the prosecutor confronted Miss Ede with Miss Boxer's account. As Miss Ede herself recounted, her response to Miss Boxer was, "I don't remember any of these things, you know, but I don't want to call you a liar * * * I don't know" (3201). [See also Miss Boxer's (782-3) and Mr. Dermody's accounts (3378) of this confrontation.]

The trial assistant also ascertained that a telephone had been installed in Miss Ede's Riverdale apartment on October 10, 1963, and so advised her. Despite this fixed incident, Miss Ede still could shed no light. She asserted the cliché that she could not be in two places at the same time, but refused to deny, or admit, that she conveyed a message for Mrs. Lazarus on that date (3164-5).

Miss Ede was confronted with Mrs. Lazarus. Still she "could not remember one way or the other" (2402).

In additiion, as she twice admitted, Dagmar also placed Miss Ede in Mrs. Lazarus' apartment before 4:00 p.m. on the afternoon in question (2662, 2669). But Miss Ede still claimed insufficient memory. It should never be for-

gotten that, throughout, the trial assistant was confronted with a witness whose instability was apparent, and ultimately confirmed medically.

In the light of these circumstances, choosing not to call Miss Ede to the stand cannot be faulted. No higher standard could be demanded than that exhibited in the investigation of her story. She had nothing to add to the case. The offer of her name and address, though perhaps unnecessary in view of the appellant's knowledge of Miss Ede and the details of her conversations in the District Attorney's Office (780, 782-4, 786, 808), was fairly and timely made.

Moreover, the credible evidence shows that the appellant was not misled by the prosecutor's statement. As pointed out by both the Appellate Division and the Court of Appeals, he knew about Miss Ede, and questioned Miss Boxer about her before and during the trial (3963, Appendix to Jurisdictional Statement, p. 5a). He is precluded now from offering her as a witness when he rejected the same opportunity at trial.

(8) There was no prosecutorial suppression of the "evidence" offered by Mrs. McNair and Mrs. Bennett.

At the hearing on his motion, the appellant produced two witnesses, residents of the East 63rd Street building where the murder occurred. These women, Mrs. McNair and Mrs. Bennett, testified that they recalled hearing four gunshots coming from a direction opposite from the appellant's apartment (2827-9, 3071-3, 3091-2). On the basis of this testimony and the failure of the People to volunteer

them as witnesses at trial, the appellant claims he is entitled to a new trial.

This claim was properly rejected by the courts below. First, the defense not only knew of the existence of the witnesses, but had unusually good access to them since one of the women, Mrs. Bennett, was a social acquaintance of one of the appellant's attorneys, Mr. Kaslow (2837, 2846, 2888-90, 2894, 2959, 2970, 2973-4, 2977-8, 2981, 2984, 2989). Second, the account given by the witnesses to the trial prosecutor, far from being the "material exculpatory evidence" now alleged, was in fact strongly inculpatory and wholly consistent with the People's theory of the case (2344, 2387-8, 2395-8, 3365-7, 3370). The only evidence found credible is that the witnesses repeatedly told Mr. Dermody and detectives that they heard shots coming from above them and toward the front of the building, the direction of the defendant's flat (*ibid*). The witnesses also told the prosecutor that they had disclosed to the defense their recollection as given to the prosecutor (3368, 3371, 3414). Finally, the credibility of these witnesses and the accuracy of their perception and recollection was seriously undermined. Their ability to identify the sounds they heard as gunshots, their changing accounts, and their plausibility on other points all led the trial court to conclude that they are "completely confused." Stating the reasons for this conclusion fully, the court wrote:

> "The defendant offered the testimony of mother and daughter, neighbors of his, Mrs. McNair and Mrs. Bennett, as proof that the shots came from a direction other than the defendant's 63rd Street apartment. Taking their credible testimony in the most favorable

light, each testified that some time in late September or early October 1963, they heard four to six loud noises which came through their living room window (an exposure which faced the rear of the building as opposed to the defendant's dwelling which was in front and two floors higher) late in the afternoon. I find no basis for believing that they recognized the sounds as gunshots, partly because Mrs. Bennett long ago denied hearing shots when questioned by the defendant's first attorney of record, Mr. Kassow, and partly because of their lack of expertise. Mrs. Bennett's recollection that she only discussed having seen a large steamer trunk in the lobby of the building during the same period—but not the 'shots' because of the trial assistant's request that she not discuss it with anyone, is completely inconsistent with her demeanor at the hearing. This voluble witness was simply incapable of restricting her desire to talk. Coupling the testimony of these witnesses with the information they gave to Mr. Dermody and Detective Leman (that the shots came from up above and towards the front of the building—and that Mr. Kassow had been so advised), the only reasonable conclusion is that they are completely confused. They misdated their conversation with Detective Leman by several months, failed to remember their description of the trunk from one week to the next, and as noted above inaccurately recounted the nature of the information they passed on to Mr. Kassow. That they may have told the prosecutor an entirely different story than what they presently recollect is so reasonable that it is the only probable explanation. The prosecutor, having been advised by the witnesses that the defendant's attorney had already been informed of matter which would tend to inculpate the defendant, could not be expected to come forward with the pointless task of repeating that information" (3904-05).

Appellant's assertion that the Appellate Division "found" to the contrary (Jurisdictional Statement, p. 22), once again misinterprets the opinion of that court (see also p. 43, *supra*). While defense claims are set forth by the Appellate Division in introduction to the ensuing legal discussion, this brief summary of the appellant's pre-hearing contentions cannot reasonably be construed as an overruling of Judge Culkin's detailed findings. If anything, in twice expressing difficulty in believing these women reliable (3964, 3967), the appellate court seems to be in accord with the trial judge. And so concurred the Court of Appeals (Appendix to Jurisdictional Statement, p. 5a).

Once the credibility of Mrs. McNair and Mrs. Bennett have been found wanting—and it is a preposterous story they tell—the refusal of the police and trial assistant to call them as witnesses is beyond fault. Indeed, the decision is repeated by the defense. It is conceded that the appellant knew that these women were witnesss to the very important presence of the trunk in the building. One can only surmise what appraisal of their yarn was made when the attorney of record conferred with Messrs. Blinder and Kleinman. The result of that colloquy is a known fact. The women were never even sought for questioning.

In sum, great violence would be done to the concepts of newly discovered evidence and prosecutorial suppression if a situation such as this one were deemed cognizable thereunder. The defense decision not to pursue known witnesses is a binding one, for the sound order of criminal trials requires diligence on the part of defense at their first opportunity [N. Y. Code Crim. Proc. §465(7)] and not repeated trials to correct possible omissions or errors of judgment.

Conclusion

The appeal should be dismissed because not taken in conformity to the requirements of 28 U. S. C. §1257(2) and because no substantial federal question has been presented, or, in the alternative, the judgment should be affirmed as fully consistent with controlling principles of constitutional law.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1966

MARK FEIN, *Appellant*

v.

THE PEOPLE OF THE STATE OF NEW YORK

On Appeal From the Court of Appeals of the State of New York

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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I

The compelling reasons why this Court should review the present case, as set forth in our Jurisdictional Statement, now have been confirmed and fortified by subsequent developments.

After our Jurisdictional Statement was filed, the Court rendered its decision in No. 81, *Parker* v. *Gladden,* 385 U.S. —, 87 S.Ct. 468, decided December 12, 1966. There the Court has expressly adopted the view that the constitutional guaranty of trial by jury is a "command of the Sixth Amendment, made applicable to the States through the Due Process Clause of the Fourteenth Amendment" (87 S.Ct. at 470). Indeed, the deliberateness of the Court's adoption of this view is underscored by Mr. Justice Harlan's statement, in his dissenting opinion, that "I cannot accede to the view that the Sixth Amendment is directly applicable to the States through the Fourteenth" (87 S.Ct. at 472).

Especially after *Parker* v. *Gladden,* there no longer can be any genuine doubt that New York's blue ribbon jury statute and procedure, as utilized and applied against appellant in this case, is unconstitutional. The five-to-four decisions sustaining constitutionality in *Fay* v. *New York,* 332 U.S. 261, and *Moore* v. *New York,* 333 U.S. 565—these being the decisions on which the New York Court of Appeals here placed its entire reliance (Jurisdictional Statement, p. 2a)—had already been wholly undermined by the later course of decisions, as we showed in our Jurisdictional Statement (pp. 29-35). Now, however, *Parker* v. *Gladden* makes manifest the completion of the change. *Fay* and *Moore* cannot be reconciled with the view this Court has so recently expressed concerning the scope of the Sixth Amendment's guaranty of trial by jury and its application to the States.

The District Attorney's Motion to Dismiss or Affirm (pp. 2-3, 9-10) seeks to suggest that the blue ribbon

jury issue was presented in the state courts solely as an alleged denial of appellant's federal constitutional rights (reviewable only on certiorari) and hence should not be entertained by this Court as an appeal as of right challenging the validity of the New York blue ribbon jury statute. But as we have pointed out (Jurisdictional Statement, pp. 7-8), the validity of the New York blue ribbon jury statute was expressly drawn in question in the trial court by appellant's timely pleading (R. 174A-175A), filed in advance of trial in response to the prosecution's motion for a special jury. In view of this, and in view of the further fact that the entire basis of the New York blue ribbon jury procedure is the statute which appellant challenged, it is evident that the validity of the statute was properly drawn in question in the state courts. Moreover, the plain intendment of the New York Court of Appeals decision was to uphold the statute's validity as against appellant's claims. Accordingly it is clear that the question is properly here as an appeal question.

But even if it were otherwise, the considerations we have adduced are, we submit, equally compelling for the granting of certiorari. The use of the blue ribbon jury infects this trial with a basic constitutional infirmity. And the non-representative nature of the panels from which this blue ribbon jury was selected is clear (Jurisdictional Statement, p. 8). The New York Court of Appeals has rested its judgment on the authority of this Court's five-to-four decisions in *Fay* and *Moore*—decisions which now, having lost their last glimmer of vitality, are in irreconcilable conflict with the views this Court more recently has adopted.

Moreover, the blue ribbon jury question is a fundamental constitutional issue which, if it is not resolved

by a decision of this Court on the merits in this direct review proceeding, will remain open for adjudication in a subsequent collateral attack proceeding. *United States ex rel. Poret and Labat* v. *Sigler,* 361 U.S. 375; *Bailey* v. *Henslee,* 361 U.S. 945, and 287 F. 2d 936 (8th Cir. 1961), certiorari denied, 368 U.S. 877; *Whitus* v. *Balkcom,* 370 U.S. 728, and 333 F. 2d 496 (5th Cir. 1964), certiorari denied, 379 U.S. 931. Certainly it is in the interests of justice, as well as the orderly administration of the criminal law, that the matter be resolved at this time instead of being deferred until later.

II

The District Attorney now (Motion to Dismiss or Affirm, p. 32) finds it necessary to concede that:

> "unlike the standards to be met before a second trial will be held on the ground of newly discovered evidence, the appellant, in order to obtain another trial, need only show that the District Attorney failed to correct testimony he knew to be perjured. This follows even where the sole point goes to the credibility of that witness."

Since, as demonstrated at pp. 16-20 of the Jurisdictional Statement, the prosecutor did, indeed, "fail to correct testimony he knew to be perjured"—including testimony given by the prosecution's own detective—this record requires that the judgment be set aside and a new trial granted.

But by distorting the record and by misapplying basic principles, the District Attorney's Motion to Dismiss or Affirm attempts to justify or minimize the flagrant constitutional violations which occurred here. Accordingly, it may be helpful to the Court if we re-

spond briefly to at least those distoritions which relate to the prosecution's suppressions and the prosecution's sponsorship of false testimony concerning Mrs. Dagmar Generazio and Gloria (the prosecutor's key witness).[1]

The District Attorney (Motion to Dismiss or Affirm, pp. 32-37) gives the spurious answer that, when Gloria and Detective Leman in their testimony at the trial concealed the presence of Mrs. Dagmar Generazio at the September 28th confrontation meeting with Gloria in the prosecutor's office, they were limiting themselves to the precise moment of Gloria's recantation and excluded the important confrontation scene which directly preceded and precipitated it. This, as shown at pp. 19-20 of our Jurisdictional Statement, is specious. Indeed it would involve a complete rewriting of the actual record. Detective Leman and Gloria, when testifying who was present at the September 28th meeting in the prosecutor's office, each named Detective Leman. Particularly since Detective Leman was present during the confrontation but was no longer present at the actual moment of Gloria's recantation, it is obvious that their trial testimony referred to the confrontation scene in the prosecutor's office, when in actuality Mrs. Dagmar Generazio (as well as Detective Leman) was present, and not to the moment of recantation. The plain fact is that Mrs. Generazio's presence was a critical event which was the whole purpose of the meeting. This event was perjuriously concealed and the prosecution succeeded in keeping it from the defense and from the jury until after the trial.

---

[1] These matters have been covered initially at pp. 9-20 and 36-43 of our Jurisdictional Statement.

Contrary to what the District Attorney now suggests (Motion to Dismiss or Affirm, pp. 36-37), the questions asked at the trial of Gloria and of Detective Leman were neither "ambiguous" nor "non-specific". Gloria, when asked about her September 28th meeting with Mr. Dermody (the prosecutor), testified that the persons present, in addition to herself and the prosecutor, were "I think Detectives Lyons and Leman", and "I don't remember anyone else" (R. 1392-1393). She then testified that Detective Leman left the room because she wanted him out (R. 1393). Thus Gloria's answer, placing Detective Leman in the room, obviously described that part of the meeting at which—as it was discovered after the trial—Mrs. Dagmar Generazio had also been present. Similarly, Detective Leman testified at the trial that during the September 28th meeting in the prosecutor's office Gloria stated she did not want to talk with Leman there and she wanted her lawyer to be present (R. 1635-1637). Detective Leman was specifically asked, "who was in the room at that time" (R. 1638). This was the time when —as the prosecutor himself admitted at the post-trial hearing—Mrs. Dagmar Generazio was present, the important confrontation scene took place as a result of which Gloria "said that she wanted to speak to a lawyer," and it was only after this that "Dagmar left the room with Detective Leman" (Dermody, R. 3496-3497). Yet in his testimony at the trial Leman answered the question by giving the names of everyone else present including himself—and he carefully omitted the name of Mrs. Generazio (R. 1638).

Thus both Gloria and Detective Leman lied at the trial in answer to specific questions. Their perjury became part and parcel of the prosecution's systematic

suppression. The prosecution's deep involvement is evident. The perjury related to a meeting which had taken place not merely in the prosecutor's office but in the prosecutor's presence—a meeting called by the prosecutor for the very purpose of confronting Gloria with Mrs. Generazio's evidence. And on the same day Gloria gave this false testimony at the trial, the prosecution once again telephoned and spoke at length to Mrs. Generazio, confirming its full awareness of the perjuries committed. (Jurisdictional Statement, pp. 14-15, 18.) Yet the prosecution left those perjuries totally undisclosed and totally uncorrected.

In addition, the Motion to Dismiss or Affirm would have this Court ignore not only the prosecution's knowing sponsorship of perjured testimony, but also all the other aspects of the prosecution's shocking suppression of Mrs. Dagmar Generazio and of the evidence she had furnished the prosecution concerning Gloria's telephone request of her. No amount of whitewash can obscure this shabby and unconstitutional course of suppression by the prosecution. The prosecution did everything possible to obliterate all trace of Mrs. Dagmar Generazio from the case—and everything possible to prevent this serious threat to its case and to Gloria's credibility from ever coming before the jury. Even if the prosecutor disbelieved what Mrs. Generazio told him, this furnishes no justification for the suppression. Nor does the fact that, at the post-trial hearing, the trial judge declined to believe Mrs. Generazio. Certainly the constitutional right to trial by jury assures that credibility of witnesses is to be determined not by judges and not by prosecutors, but by the jury. See, e.g., *Jackson* v. *Denno,* 378 U.S. 368, 386 note 13; *Quercia* v. *United States,* 289 U.S. 466, 470-472. The jury was prevented

from exercising this responsibility because of the prosecution's conduct. Yet having been wholly successful in its endeavor to keep all this evidence from reaching the jury, the prosecution now seeks to invoke the standards and authorities applicable merely to "newly discovered evidence" (Motion to Dismiss or Affirm, pp. 27-29) and not those applicable where perjury has been knowingly sponsored or where evidence has been suppressed by the prosecution.

The District Attorney (Motion to Dismiss or Affirm, pp. 23, 31-32, 39) also seeks to support the judgment by claiming the prosecution's whole course of concealment and suppression may be disregarded because the defense was sufficiently "aware" of what was suppressed. But as we have shown (Jurisdictional Statement, pp. 20, 39), a defense investigator during the trial had learned no more than a "grapevine rumor" that a girl named Dagmar Finch had told the District Attorney's Office that Gloria had called her for the loan of a car. The defense did not know, and had no reason to know, that Dagmar Finch had married, that her married name was Mrs. Generazio, and that she was no longer in the State but was living in New Jersey. These facts all were fully known to the prosecution, which was in virtually continuous contact with her both by personal conference and by telephone; and, indeed, the prosecution's chief investigator on the case, Detective Leman, affirmatively refused to give any such information to the defense when a request was made during the trial (Jurisdictional Statement, p. 20). Moreover, the prosecution never gave the defense any information concerning what Mrs. Generazio had told the prosecution, and never gave the defense any inkling con-

cerning the important and explosive confrontation scene which had occurred in the prosecutor's office between Mrs. Generazio and Gloria. Nor did the defense know, or have any reason to know, of what Mrs. Generazio had told the prosecution concerning Gloria's subsequent efforts to induce Mrs. Generazio to "stick with her" (Jurisdictional Statement, pp. 13, 41). All this, which the defense should have had the opportunity to bring before the jury, was relentlessly and successfully suppressed and concealed by the prosecution until after the trial was over and the verdict was in.

III

As our Jurisdictional Statement shows (pp. 46-50), the question of appellant's standing to challenge the unconstitutional seizure of the chair from the warehouse is an important constitutional question as to which a marked conflict exists in the decisions. The very recent decisions, most of them reported subsequent to the filing of our Jurisdictional Statement, confirm that this basic question—that is, the question whether evidence seized in violation of the Fourth Amendment "shall not be used at all" (*Mapp* v. *Ohio*, 367 U.S. 643, 648)—continues to be a matter of recurring and widespread importance in both federal and state courts. *Elbel* v. *United States*, 364 F. 2d 127, 136-138 (10th Cir., 1966); *Corngold* v. *United States*, 367 F. 2d 1, 7 (9th Cir., 1966), *State* v. *Newson*, 26 Conn. Sup. 297, 222 A. 2d 236 (1966); *State* v. *McParlin*, 221 A. 2d 790 (R.I., 1966); *People* v. *Loncar*, 4 Mich. App. 281, 144 N.W. 2d 801 (1966). The matter urgently requires resolution by this Court at this time in order that the policies enunciated in *Mapp* and succeeding decisions of this Court be not circumvented.

Moreover, somewhat comparable questions are now before the Court in No. 750, *Granello* v. *United States,* pending on petition for certiorari from the Second Circuit's decision in *United States* v. *Granello,* 365 F. 2d 990, 995-996.

In purported reliance on *Abel* v. *United States,* 362 U.S. 217, and *Hester* v. *United States,* 265 U.S. 67, the District Attorney suggests (Motion to Dismiss or Affirm, p. 18) that in this case the warrantless search and seizure took on an entirely different legal significance because of appellant's alleged abandonment of the chair. As we have pointed out (Jurisdictional Statement, pp. 44-45), there was no abandonment of the chair (which was stored under appellant's own pseudonym), and, furthermore, the New York courts have even denied appellant his constitutional right to a hearing on the issue, at which the critical facts could have been ascertained. Moreover, *Abel* and *Hester* are in any event wide of the mark because, contrary to the present case, they involved searches and seizures which did not violate anyone's Fourth Amendment rights. In *Abel,* for example, the defendant had vacated the hotel room where the search took place and had abandoned the property seized therefrom, and the hotel management, wholly unlike the warehouse manager in this case, freely gave its consent (362 U.S. at 241) to the search and seizure.[2]

The District Attorney's further contention (Motion to Dismiss or Affirm, pp. 16-17) that appellant's mo-

[2] Indeed, *Abel* and *Hester* were distinguished on such grounds in *United States* v. *Merritt,* 293 F. 2d 742, 745 (3rd Cir. 1961), a decision which, as we already have noted (Jurisdictional Statement, p. 44), can hardly be squared with that of the New York Court of Appeals in the present case.

tion for a hearing was untimely and that his objection was knowingly waived is frivolous. The record conclusively demonstrates that the question of the unconstitutionality of the search and seizure was raised in a timely manner (Jurisdictional Statement, pp. 25-26). Not only did appellant's counsel not waive his objection to the admissibility of the chair as evidence, but, when it was admitted into evidence, he objected and sought a hearing. This request the trial judge rejected despite a clear showing on the record of a prior understanding with the court that appellant's rights to a hearing were being fully preserved. Finally it should be noted that the New York Court of Appeals did not conclude that this question had not been properly preserved; instead, it expressly decided it on the merits, on the sole specious ground that "abandonment" resulted in lack of standing. (Jurisdictional Statement, p. 3a).

CONCLUSION

For the reasons set forth in our Jurisdictional Statement, as reinforced by the additional reasons set forth in this Brief, the Court should note probable jurisdiction without limitation, and should give consideration to the merits so as to lead to reversal of the judgment below.

Respectfully submitted,

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No. 793

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

MARK FEIN, *Appellant*

v.

THE PEOPLE OF THE STATE OF NEW YORK

On Appeal From the Court of Appeals of the State of New York

APPELLANT'S PETITION FOR REHEARING

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March, 1967

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On Appeal From the Court of Appeals of the State of New York

APPELLANT'S PETITION FOR REHEARING

Appellant respectfully petitions for rehearing of this Court's order of January 23, 1967, which dismissed appellant's appeal and denied certiorari with the following Per Curiam:

> "The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.
>
> "MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted."

I

In the submissions made to this Court before the order of January 23rd, appellant urged (Jurisdictional Statement, pp. 7-9; Brief Opposing Motion to Dismiss or Affirm, pp. 2-3) that this Court should exercise jurisdiction on appeal, under 28 U.S.C. § 1257(2), because the validity of the New York blue ribbon jury statute (former Section 749-aa of the New York Judiciary Law), under the Federal Constitution, had been drawn in question in the State courts and had been passed upon by the New York Court of Appeals. The District Attorney, on the other hand, urged (Motion to Dismiss or Affirm, pp. 2-3, 9-10) that in the New York appellate courts the blue ribbon jury issue had been presented and decided solely as an alleged denial of appellant's federal constitutional rights (reviewable in this Court only on certiorari) and that this Court should dismiss appellant's appeal as of right for want of jurisdiction.

From the January 23rd Per Curiam decision, it appeared that this Court was not satisfied that the record made sufficiently clear that the validity of the New York blue ribbon statute had been actually passed upon by the New York Court of Appeals. Accordingly, appellant then filed in the New York Court of Appeals a motion seeking clarification on this matter. Specifically, the motion requested the New York Court of Appeals to amend its remittitur, so as to state expressly that the Court of Appeals had necessarily passed upon the question of the validity, under the Constitution of the United States, of the New York blue ribbon jury statute (former Section 749-aa of the New York Judiciary Law) and had determined that said statute was not unconstitutional. Appellant's motion in the New

York Court of Appeals set forth the facts relating to the presentation of the blue ribbon jury issue in the New York courts and in this Court. The motion showed that the record (R. 174A-175A) leaves no doubt that the validity of the New York blue ribbon jury statute, under the Federal Constitution, had been expressly drawn in question by a timely pleading filed by appellant in the trial court in advance of trial. The motion also submitted that the New York Court of Appeals, in deciding the blue ribbon jury question on the authority of *Fay* v. *New York,* 332 U.S. 261, and *Moore* v. *New York,* 333 U.S. 565, must surely have intended to determine that the New York blue ribbon jury statute, which was applied to appellant, was a constitutional statute—that is, that the statute was not subject to constitutional infirmity under the provisions of the Federal Constitution. The motion urged it would be a grave injustice if appellant were to be deprived of his appeal as of right to this Court because of any uncertainty as to whether the issue involving the validity of the statute had been actually decided by the New York Court of Appeals. Accordingly, the Court of Appeals was requested to amend its remittitur so as to state expressly that the validity of the statute under the United States Constitution had been necessarily passed upon.[1]

---

[1] Promptly after filing this motion to amend the remittitur in the New York Court of Appeals, appellant, upon a showing that such a motion had been made, applied for and obtained from Mr. Justice Harlan an extension of time to and including March 8, 1967, for the filing of a petition for rehearing in this Court; issuance of this Court's mandate was likewise stayed. The present Petition for Rehearing is being filed within the time as thus extended.

In the New York Court of Appeals the District Attorney vigorously opposed appellant's motion to amend the remittitur. The District Attorney claimed, among other things, that the Court of Appeals had not passed upon the validity of the blue ribbon jury statute. The New York Court of Appeals, however, which was in a position to state authoritatively what it had passed upon, rejected the District Attorney's contention, and unanimously granted appellant's motion on February 21, 1967, issuing the following order:

> "A motion to further amend the remittitur in the above cause to this Court having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is
>
> "ORDERED, that the said motion be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be further amended by adding thereto the following:
>
> 'Upon the appeal herein there was presented and necessarily passed upon the following question under the Constitution of the United States, viz.: Appellant contended that the order of the trial court, subjecting him to a trial before a special jury rather than a general jury, denied him a fair trial and deprived him of due process and the equal protection of the laws. The Court of Appeals held that the appellant's constitutional rights were not violated and that former Section 749-aa of the Judiciary Law authorizing such a trial is constitutional.' "

The remittitur has accordingly been amended in conformity with this order. As thus amended, the re-

mittitur is set forth in the Appendix to this Petition for Rehearing.[2]

Amendment of the remittitur is an established and accepted means of clarifying such matters which come for review to this Court from the New York Court of Appeals. See, for example, *Willner* v. *Committee on Character,* 373 U.S. 96, 102-106; *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94, 97; *Bakery Drivers Local* v. *Wohl,* 315 U.S. 769, 773; *Cafeteria Union* v. *Angelos,* 319 U.S. 753, 778, and 320 U.S. 293.[3] In the present case the supervening action has expressly confirmed that the New York Court of Appeals did pass upon the constitutionality of the New York blue ribbon jury statute, under the Constitution of the United States, and held that the statute authorizing trial of appellant by a blue ribbon jury is constitutional.

---

[2] We have now filed with the clerk of this Court certified copies of the following supplemental record, which reflects the proceedings in the New York Court of Appeals subsequent to this Court's order of January 23, 1967: (1) appellant's Notice of Motion to amend the remittitur, together with supporting Affidavit of appellant's counsel; (2) the District Attorney's assistant's Affidavit in Opposition; (3) the Reply Affidavit of appellant's counsel; (4) the New York Court of Appeals decision of February 21, 1967, granting appellant's motion to amend the remittitur; and (5) the remittitur as amended by the New York Court of Appeals pursuant to its order of February 21, 1967.

[3] Thus in *Bakery Drivers Local* v. *Wohl* this Court originally denied certiorari on the ground that "It does not appear from the record that the federal question presented by the petition was necessarily decided by the Court of Appeals" (313 U.S. 572). An amendment of the remittitur was thereafter obtained from the New York Court of Appeals specifying that the federal question had been necessarily passed upon; and this Court then granted rehearing and granted certiorari (313 U.S. 548). A similar sequence occurred in *Cafeteria Union* v. *Angelos.*

Under these circumstances, this Court's appeal jurisdiction under 28 U.S.C. § 1257(2) has now been plainly shown, and the appeal as of right should be entertained.

We already have set forth (Jurisdictional Statement pp. 29-35; Brief Opposing Motion to Dismiss or Affirm, pp. 2-4) the reasons why the question of the validity of the blue ribbon jury statute is substantial and deserves review by this Court; the reasons why this Court should, on the merits, determine specifically that the five-to-four decisions in *Fay* v. *New York,* 332 U.S. 261, and *Moore* v. *New York,* 333 U.S. 565, no longer reflect the applicable constitutional doctrine; and the reasons why the subsequent course of this Court's decisions—as exemplified most recently by the Court's opinions in *Parker* v. *Gladden,* 385 U.S. 363, 364 (Sixth Amendment) and in *Spevack* v. *Klein,* 385 U.S. 511 (Self-Incrimination Clause of Fifth Amendment, overruling *Cohen* v. *Hurley,* 366 U.S. 117)—shows the marked shift in constitutional doctrine which has occurred. These are the reasons on which we continue to rely, now that the amendment to the remittitur has removed the jurisdictional obstacle to this Court's entertaining appellant's appeal as of right. If the concept of an appeal as of right from a State court still retains meaning, then this present appeal is one which the Court most certainly should hear.

There is also one other supervening circumstance militating in favor of a review by this Court of the merits of the blue ribbon jury issue—whether the issue comes here by appeal or by certiorari. In our Jurisdictional Statement (pp. 32-33) we invited attention to the fact that the outmoded constitutional doctrine adhered to here by the New York Court of

Appeals, in order to affirm appellant's conviction, was in direct conflict with the constitutional principles expressed in the Fifth Circuit's decision in *Labat* v. *Bennett,* 365 F. 2d 698, a decision involving collateral voiding of State court convictions in Louisiana on the ground that the federal constitutional right to an impartial jury representing a cross-section of the community had been violated. In that case the Attorney General of Louisiana now has filed a petition for certiorari, No. 956, *Bennett* v. *Labat,* which is pending before this Court for disposition. If the Court grants certiorari in No. 956, we urge that the Court should, for this reason also, accept the present case and, if practicable, set the two down for argument consecutively. If, on the other hand, the Court denies certiorari in No. 956, the finality of the constitutional principles expressed in *Labat* v. *Bennett* will have become established within the States comprising the Fifth Circuit; and the present case should accordingly be reviewed so that a conflicting set of principles would not be allowed to be used in the State courts of New York to keep appellant imprisoned under a sentence of thirty years to life imprisonment.

II

Our previous submissions to this Court (Jurisdictional Statement, pp. 36-43; Brief Opposing Motion to Dismiss or Affirm, pp. 4-9) developed the reasons why this Court should review on the merits the important constitutional questions arising out of the prosecution's concealment of material evidence and the prosecution's sponsorship of false testimony. (It was on this basis that Judge Fuld had dissented in the New York Court of Appeals.) Subsequent to its January 23rd order in

the present case, this Court rendered two decisions, No. 250, *Miller* v. *Pate,* decided February 13, 1967, and No. 27, *Giles* v. *Maryland,* decided February 20, 1967, which give fresh emphasis to the need for this Court to review the New York Court of Appeals decision here.

In *Miller* v. *Pate* the Court (slip opinion, p. 6) stressed that "More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence", that "there has been no deviation from that established principle", and that "there can be no retreat from that principle". Application of this clear-cut principle in the present case leaves the judgment of the New York Court of Appeals utterly without foundation. Here, as we have shown, the prosecution in bringing about appellant's conviction succeeded in its effort at extensive concealment of evidence material to the defense. But even apart from such concealment, the record makes it plain that the prosecution affirmatively sponsored false testimony by its key witness Gloria and by its own chief investigator, Detective Leman—this being evidence which the prosecutor's own testimony at the post-trial hearing established that he knew to be false (Jurisdictional Statement, pp. 16-20; Brief Opposing Motion to Dismiss or Affirm, pp. 4-7).

Special problems presented by the record in the *Giles* case led to a diversity of views expressed in the several opinions rendered there. But we submit that, in any event, the judgment of the New York Court of Appeals in the present case cannot be reconciled with the opinions expressed by any of the justices, whether in the majority or in dissent, in *Giles.* For example, the

extensive suppression and nondisclosure which the prosecution here indulged in—and the prosecution's related failure to correct the testimony which it introduced, knowing it to be false—bring this case clearly within the principles expressly recognized as controlling by the *Giles* dissenting opinion (slip opinion, p. 15).

Thus the result which the New York Court of Appeals reached here is in direct collision with the principles and the standards most recently expressed by this Court, as enunciated in *Miller* and *Giles*.

In our Jurisdictional Statement (pp. 40-43) we urged that these serious infringements of appellant's constitutional rights were of such a nature that, in the light of the whole record, it must be concluded that the evidence falsified and the evidence concealed by the prosecution "may have had an effect on the outcome of the trial"—to use the test which this Court applied in *Napue* v. *Illinois*, 360 U.S. 264, 272. Hence, we said, the New York Court of Appeals could not be supported in its view that any error on these matters was, somehow or other, not material. This Court's supervening decision in No. 95, *Chapman* v. *California*, decided February 20, 1967, brings even more into focus the fundamental nature of the New York Court of Appeals' departure from the applicable constitutional standards. *Chapman* clarified previous decisions by holding expressly, with respect to State court trials, "that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt" (slip opinion, pp. 6-7). Assessed by such a standard, we submit it is clear that the judgment of the New York Court of Appeals must be overturned.

III

Our prior submissions to this Court (Jurisdictional Statement, pp. 44-50; Brief Opposing Motion to Dismiss or Affirm, pp. 9-11) advanced the reasons why this Court should review on the merits the search and seizure issues presented by this record—including the question of appellant's standing to challange the unconstitutional seizure of the chair seized from the warehouse. This question the New York Court of Appeals decided against appellant on the ground that he had "abandoned" the property, even though appellant had been denied the hearing he was entitled to, both under the New York statute and under the Federal Constitution, on the abandonment issue.

Subsequently, on February 20, 1967, this Court granted certiorari in No. 929, *Massachusetts* v. *Painten,* in which the Attorney General of Massachusetts is seeking review of the First Circuit's decision in 368 F.2d 142. The third question presented by the petition for certiorari in No. 929 is: "Does the respondent have standing to assert suppression of abandoned property as evidence?" In view of the fact that this Court now has decided to review such a question on the merits in No. 929, we submit it is highly appropriate that it be likewise reviewed in appellant's case. The two cases together would, indeed, present for the Court a far more complete picture of the ramifications of the issue than would No. 929 alone.

CONCLUSION

For the foregoing reasons, in addition to those previously advanced, rehearing of the order of January 23, 1967, should be granted; probable jurisdiction should be noted; and in any event, either on appeal or on certiorari, the federal constitutional questions presented should be heard by this Court on the merits.

Respectfully submitted,

LOUIS NIZER
PAUL MARTINSON
1501 Broadway
New York, New York 10036

BENNETT BOSKEY
918 16th Street, N.W.
Washington, D. C. 20006

March, 1967

CERTIFICATE OF COUNSEL

Pursuant to Rule 58, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in paragraph 2 of Rule 58.

BENNETT BOSKEY

APPENDIX

Remittitur of New York Court of Appeals, July 7, 1966, as amended pursuant to order dated February 21, 1967

1. No. 511. 65

THE PEOPLE &c., *Respondent,*

vs.

MARK FEIN, *Appellant.*

BE IT REMEMBERED, That on the 17th day of November in the year of our Lord one thousand nine hundred and sixty-five, Mark Fein, the appellant in this cause, came here unto the Court of Appeals, by Phillips, Nizer, Benjamin, Krim & Ballon, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And The People &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Louis Nizer, of counsel for the appellant, and by Mr. Eric A. Seiff, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, and thereafter a motion to amend the remittitur having been granted this remittitur is hereby amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed upon the following question under the Constitution of the United States, in addition to the other constitutional questions expressly passed upon in the opinion, viz.: Appellant contended that the order of the Supreme Court denying his pretrial motion for discovery and inspection of the bullets

found in decedent's body deprived him of a fair trial. The Court of Appeals held that the appellant's constitutional rights were not violated.

And thereafter a motion to further amend the remittitur having been granted this remittitur is hereby further amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed upon the following question under the Constitution of the United States, viz: Appellant contended that the order of the trial court, subjecting him to a trial before a special jury rather that a general jury, denied him a fair trial and deprived him of due process and the equal protection of the laws. The Court of Appeals held that the appellant's constitutional rights were not violated and that former Section 749-aa of the Judiciary Law authorizing such a trial is constitutional.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, by the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

Court of Appeals, Clerk's Office,
Albany, July 7, 1966.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk.

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

Witness,

THE HON. CHARLES S. DESMOND,
Chief Judge, *Presiding.*
RAYMOND J. CANNON,
Clerk.

REMITTITUR July 7, 1966

Original Remittitur Filed Jul 18 1966
Supreme Court
New York County
Appeal Bureau

Amended Remittitur Refiled Mar 1 1967
Supreme Court
New York County
Appeal Bureau